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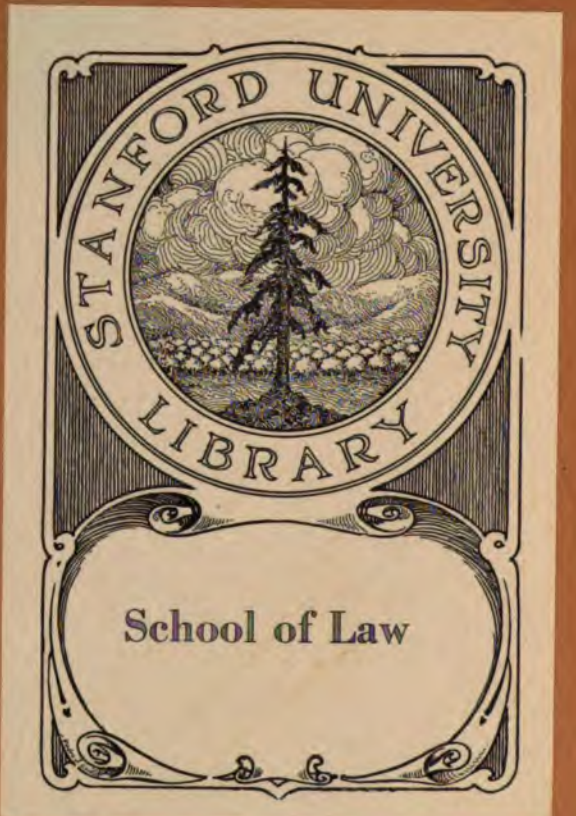
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A DIVORCE COURT IN CANADA.

An Address given before The Ontario Bar Association, by E. F. B. Johnston, K.C.

To deal properly with the question, whether we should have a Divorce Court in Canada or remain under present conditions, requires great consideration, and involves discussion of a very difficult subject. It is, perhaps, needless to state that what I shall say to you on the matter is entirely my own personal view, and does not in any sense pretend to be the opinion of the Bar Association of Ontario.

I have been requested to give an address on the subject from an independent standpoint, and having devoted much thought to the many difficulties in the way of a satisfactory solution of the question, I shall endeavour to place before you in a concise and logical form the reasons which have led me to the conclusions which I propose to present to you.

Involving, as it does, issues of various kinds—moral, religious, national and individual—the subject will be more intelligently dealt with by eliminating some phases which have their origin in the minds of certain classes, but which do not extend to the general public. The exigencies of modern social life and the conditions of a highly artificial and complex system of human relationship have practically changed in later days the relative positions of men and women. What may have once been cogent arguments in favour of a law preventing divorce under any or all circumstances, may not be at all applicable to our present conditions.

We find instances by way of illustration in other branches of the law. Combinations which at one time were altogether contrary to law are now, with certain limitations, quite lawful. Acts which

were at one time harmless, have been made crimes by statute. Many things which a century ago were looked upon as deeds of evil are now treated as ordinary acts in the lives of respectable citizens, and, conversely, the pleasures of the past are in some cases treated as sins in the present generation. It is impossible to fix a uniform, continuing standard for many of our motives and actions. It is equally difficult to determine the exact limits of moral conduct. Even in important questions relating to religion, very learned and pious divines have been known to differ. Let us, therefore, eliminate the religious aspect entirely, and this may be done on sufficient grounds, because granting of divorces is an established practice. Whatever our individual views may be, divorces under a recognized practice, and subject to well-defined principles, are granted, and are legal and effective. We must accept this state of affairs as beyond our control. The only enquiry open to us, therefore, is that relating to the methods of obtaining a divorce, and the grounds upon which it should be given. In order to understand the situation more clearly, I propose to deal briefly with one or two matters which lie at the threshold, and to examine the foundation on which the fabric of marriage rests.

It is generally considered that the marriage ceremony is a contract, but in addition to this, a large proportion of the body politic treat it as sacramental in its character, and hold that the marriage tie should not be interfered with under any circumstances. As I have stated, it is interfered with by virtue of legal authority, and a discussion on any other basis is to a great extent purely academic. We must take conditions as we find them. Indeed, the subject itself which I have been asked to discuss implies the continued existence of a right to obtain a divorce, and thereby to sever the marriage relationship.

Omitting, therefore, the proposition that marriage is more than a mere contract, and confining ourselves to the contention that it is partly in the nature of a contract, voluntarily entered into between a man and a woman and made legal by a compliance with existing law, the question forcibly presents itself to one's mind in this way: Why

should not such a contract be annulled just as any other legal and binding contract may be annulled by a court of law, if the circumstances and conditions be such as to warrant the court in so doing? I am not now dealing with the point as to what such conditions ought to be. I shall have something to say about that later on, but for present purposes I ask, if any other lawful contract can be voided by legal interposition, why not this one? I shall endeavour to give reasons why it should come within the scope of the law regarding contracts generally, but it appears to me that we have first to consider some other elements before answering the question I have just submitted for your consideration.

One element is that marriage is more than a contract. It is a status or condition of civilized social life carrying with it certain limitations and qualifications. When individuals marry, they enter on an entirely different phase of life, and are governed by a new relationship to human environment. The man is no longer a free agent. His actions are governed by new and different principles. He is not at liberty to roam at large. His duties are entirely changed, and his obligations assume a new character. Socially, he is bound to respect his wife and properly maintain her and his family, or he must lose caste with his fellow-citizens, and may become amenable to the law. His status in certain respects with regard to women other than his wife is absolutely reversed. Even his outgoings and incomings are circumscribed, and he finds that the perspective of his life is shifted by reason of the new condition in which he finds himself. So it is also with his wife. She no longer finds her friends as before, perhaps entirely outside the husband's circle. Her marriage has removed her to another plane, and her outlook is towards a new horizon. Many things she cannot any longer do, and many others she may now do, which were outside the sphere of spinsterhood. Both parties have drawn apart from former surroundings and have formed an entirely new relation. But for the moral law, aided by the law of the country in which they live, they might have acquired this status without the marriage law or ceremony at all.

Now, if this condition in which they find themselves becomes intolerable, why should they not be restored to their original position? Does the contract make it any the more imperative that they should be compelled to lead lives of misery, ending in death as the only relief? They may voluntarily separate, why not legally? They changed their status voluntarily, and without any obligation to the law in doing so. The law permits them practically to separate and live apart, as if they were unmarried, except that the restraint of the marriage tie remains, and marriage with another cannot be entered into. In other words, nearly all the practical results of single life, with its so-called freedom and relief from domestic trouble and responsibility, may be obtained by an agreement between the parties. Morally and socially they are divorced, and yet they must continue to be bound to each other by a bond which requires in Canada the united power of the Senate and Commons to sever. Regarding such a state of life, it may be fairly argued that having done all the damage possible to the marriage relationship, having destroyed the peace and union of a family, and having opened the door for scandal and endangered the reputation of both parties by making a separation valid and enforceable, the law might go a step further, and as a surgeon with his knife cuts away the diseased tissue to save the limb, so might the courts be empowered to operate on the moral and domestic relationship of husband and wife, and thereby save whatever of honour, virtue or respect might be found in the wreck of two lives.

But it will be said that the sanctity of the marriage tie must be protected. That this is right and necessary must be freely admitted. But what do you say about a case where the husband or wife, or both, have themselves degraded the marriage obligations, defiled the sanctity of the marriage relation, and rendered life unbearable and disreputable. Take the usual evidence in alimony actions, to say nothing of the graver facts in divorce cases. Open and notorious misconduct of the gravest character; cruelty, contempt and antagonism down to the minutest trifles of life; absolute want of sentiment; constant quarrelling with each

other without any regard or consideration; actuated by the coarsest and most vicious feelings, and every day of life treating one or the other of them as entitled to less kindness or sympathy than a person would shew towards his dog or horse; given this not uncommon state of affairs, and then consider that such relationship may and likely will continue through many years until a tribunal beyond the courts of law cuts the tie and gives relief to one of the parties, and perhaps to both. I do not exaggerate the circumstances to which I have referred. Judges and lawyers know the unfortunate condition in which married life sometimes finds itself. The average citizen knows but little of these matters. What comes to him is only the scandal. The suffering and inner life are not revealed until laid bare in the witness box. And knowing what we do, does it not appear to us as mere words when we hear people argue strenuously that the sanctity of the marriage tie must be maintained at all costs, notwithstanding the fact that the parties bound together by it have so degraded it as to make it the symbol of physical bondage instead of the badge of purity and the emblem of happiness?

A strong argument in favour of divorce is, in my judgment, the danger resulting from legal or other separations without dissolution. The parties to such arrangements are practically neither married nor single. The man who leaves his wife under any circumstances goes back to the world under a cloud, justly or unjustly, according to the facts. His future conduct in time becomes a matter of no great consequence. In many instances, he leaves his country, goes elsewhere, gets an irregular divorce and marries again. So with the wife, who, neglected and forsaken, meets with so little sympathy or assistance even from her own sex, that she too degenerates owing to the want of a sustaining moral force. She may fall into straitened circumstances, temptation may become too strong, and the result is what might naturally be expected. One family legitimate, but deserted and handicapped through no fault of theirs, and two human derelicts, living irregular lives, and perhaps responsible for children who have neither name nor heritage is the story told

in most cases of the husband and wife who ought to be absolutely and judicially separated, but who are compelled to drag along in chains which a professedly moral world says are not to be interfered with. The rich man knows nothing of the pangs of hunger and poverty. The good man knows little of the depth of degradation into which many of his fellow-men have fallen. The husband and father, whose life is one of peace and domestic happiness, cannot understand the terrible ordeal a frail, delicate and sensitive woman may have to undergo at the hands of a brutal husband, or what a husband suffers through the neglect and infidelities of a reckless wife. The evil results of such conditions are felt most keenly by those who have no means of indulging in pleasure of any kind. Engaged all day in labour or business drudgery, the return each evening to what is misnamed home is accompanied by or is met with a repetition of violence, abuse and suspicions which have destroyed the sympathy and kindness of the earlier years of married life, if such feelings ever existed. Escape by legal means from this daily and hourly life of misery is practically impossible to people without money. Drink is indulged in as an antidote to the domestic poison, but this only aggravates the disease and often ends in crime. The rough outline of such lives is all that the world knows or sees. The sins of the erring wife, or the brutality of the husband are never fully known to the public. A Divorce Court alone can shew something of the facts following an unfortunate marriage, but the whole truth of domestic unhappiness cannot in any case be fully expressed.

I say, therefore, that there are many cases in which relief of a permanent character should be given. If this proposition is granted, it then becomes only a matter of prudence and wisdom, as to how far and on what grounds, relief may be open to those whose claims come within the general class of cases deserving remedial action. It is however argued that it is better that such things should be than that the door should be opened to divorce proceedings, and it is also contended that by opening the door, the general tone of morality and the standard of married life

will be lowered. The result in the United States is pointed to as evidence of this, and it is said that in that country marriage has lost its significance, and the ideals of home life have been shattered.

In this connection, I would like to deal with the statements so frequently made regarding the divorce laws and methods of the United States. One of the most common arguments used by those opposed to a Canadian Divorce Court is the one I have just mentioned,—namely, that marriage is not only a failure in the United States, but is practically disregarded by a large proportion of the people, and that this condition has been brought about by loose divorce laws and procedure.

Is this allegation correct? If so, it is entitled to great weight. What do the facts and statistics shew? We can arrive at no reasonable conclusion as to the proportion of divorces to marriages. It is assumed by some writers to be as one to fifteen. As to this, it is clear on examining the facts that no such proportion exists, having regard to the method of calculation adopted by such writers. In the first place, there is no record of marriages kept in at least one-half of the States, and no means of finding out the correct figures. There are hundreds of thousands of immigrants to that country every year, mostly married, of whose marriages there is no record, except in Europe, or some other continent. Under what is known as Census Reports all judicial separations, conditional decrees, and all cases in which the marriage is declared a nullity from the beginning are included under the heading "Divorce." And I venture to say from facts which have come before me in the course of my practice, that the number of Canadians who acquire irregular and fraudulent divorce in the United States is ten times greater than the total number of divorces granted in Canada. We should consider the important fact that the comparison is not sound, because in many of the States, divorces may be granted on very trivial grounds, which are not contemplated or advocated in this country. Even with this fact to aid us, it is a singular circumstance that in some States where the causes are

both slight and numerous, the increase of divorces is not marked, and that in New York State, where adultery is the only cause, the increase is greater and steadily growing. The causes vary in the States from adultery to "causes deemed sufficient by the court" as in Washington State, and we find the same want of uniformity in practice as we do in Canada. That is accounted for, to some extent, by the fact that each State deals independently with the subject.

But I think there is a broader ground than mere statistics on which the question can be put. We have not as yet the dense commercial centres we find south of our boundary. There is not that restless and changing spirit which actuates so many American citizens. The substitution of business rush for home ideals, the desire to make money quickly, the mode of living in hotels and rooms, the growing tendency towards travel and variety, impatience of restraint, and perhaps more than we are aware of, the absolute, individual independence of the man and woman, and the freedom of both married and unmarried life, —all these must be important factors in considering the present state of divorce laws and their effect in the United States. Except in the case of very large cities, and looking at the country as a whole, there is no ground for saying that the general morality of the American citizen, farmer, artisan or business man is lower than it is in any other country. We have only to look at such places as Italy or Spain where no divorces are permitted, and where morality is at any rate no higher than it is in America, to realize that divorces are not the cause of the low moral tone of any country.

The want of uniformity in Canadian divorce law is one of the strangest features in an otherwise reasonable Constitution. In British Columbia there is a Divorce Court based somewhat on the principles of the English law, under the Act of 1857. Courts for granting absolute divorces were established in New Brunswick, Nova Scotia and Prince Edward Island before Confederation, and these were continued by sec. 129 of the B.N.A. Act, 1867. Ontario, Quebec and the remaining provinces of the Dom-

inion are without Courts of Divorce, and the application for relief must be made to Parliament, both bodies having to pronounce the dissolution of the marriage obligation, which is done by a hearing of witnesses before a Senate Committee and if a proper case is made out, this is followed by a private Act of the House of Commons. It is certainly one of the most remarkable anomalies in the history of Constitutions. The exclusive right to legislate on marriage and divorce is given by the British North America Act, 1867, to the Parliament of Canada, and yet notwithstanding the British North America Act, there is no uniformity of the law, and the right is, as I have stated, exercised under a saving clause by several of the Provinces to the exclusion of Dominion authority. Quebec, then Lower Canada, a Province opposed to divorce laws, was the cause of this anomalous condition of things, although, I have no doubt, Upper Canada was, as a whole, disinclined at that time to deal with the question of establishing Courts of Divorce in this country. Owing to the state of the law now in force here, a grave injustice is experienced. There is in respect of divorce, one law for the rich and another for the poor. This may be said to be inaccurate. It is so theoretically, but in practice, it is undoubtedly true. In ordinary litigation, care has been taken to bring the place of trial of both civil and criminal cases to the doors of the litigants. Judges travel from one end of each province to the other twice a year and more often in some localities, in order that the poor man may have justice on the same terms as his richer neighbour enjoys. A ten-dollar Division Court case takes a County Judge thirty miles from the county town, in order that a trumpery dispute may be settled according to law. Actions within the jurisdiction of the County Court, and larger issues requiring the aid of High Court Judges, are disposed of at the county towns in almost every county in the Dominion. Magistrates are provided in every school section to dispose of troubles of a petty character. And yet with all this expense and care in matters largely of a monetary and temporary nature, the unfortunate woman who is grossly wronged, and is being slowly yet surely

battered to death, or the equally unfortunate man who is bound to an adulterous wife has to travel perhaps thousands of miles to get relief, and can get it only by a slow, tedious, and expensive process.

This state of affairs is a blot on the administration of justice in a civilized country. If the party is poor, justice cannot be had. Only the rich can avail themselves of our present system of granting divorces. And let me remark in this connection that the remedy is practically denied by force of circumstances to those upon whom the burden lies most heavily, and in respect of whom the most dangerous and immoral results are most likely to follow. Money, under the circumstances which give rise to divorce, affords relief in the way of travel, change of residence and other means of escape, but poverty drives both the man and woman to desperate deeds, and to a still more desperate condition of immorality and degradation.

Having thus briefly touched on some of the conditions with which we have to deal in this discussion, I wish to call your attention for a few moments to the subject of divorce in its legal aspect, and the remedies which in my opinion ought to be provided to meet present conditions. It may be useful to see what has been done in the past history of England towards a solution of the problem which confronts, and has for centuries, confronted thinking men and women. I do not hope to say anything original in this connection, but if I can direct your minds to some new line of thought, or create a new phase of reflection and analysis, I shall be fully satisfied that my work has not been in vain.

First, let me take up the record. It has always been admitted that the wrongs suffered by the innocent partner in matrimony are entitled to some remedy. The Ecclesiastical Courts had the earliest jurisdiction. In the very early days in England, these courts took upon themselves, or acquired the power to grant a divorce, *a mensa et thoro*. Although marriage was looked upon as indissoluble, there grew up various schemes for declaring the marriage a nullity *ab initio*, on the ground that an im-

pediment of relationship existed. This is described by a well-known writer as a "relationship which might consist in some remote or fanciful connection between the parties or their god-parents." Later on, and particularly after the Reformation, resort was had to Parliament for private Acts authorizing divorce and permitting re-marriage, owing to the fact that there were no courts having jurisdiction to decree a divorce *a vinculo*. This remedy was adopted by no less a person than Royalty, in the case of Henry VIII. The first Private Divorce Act related to the Marquess of Northampton, whose re-marriage after a decree of separation by the Ecclesiastical Court was declared to be valid by a Commission under the Archbishop of Canterbury. This was further confirmed by statute, and, indeed, it was accepted law that a statute was necessary. Acts of Parliament became more frequent in the 17th and 18th centuries until 1798, when Lord Chancellor Loughborough succeeded in getting certain remedial orders passed by the House of Lords. Applications for absolute divorce had, under this new practice, to be founded on Ecclesiastical decrees and verdicts at law in crim. con. actions, or good grounds shewn why such verdicts could not be obtained. The ground was adultery. A Royal Commission sat and reported. It was felt that a gross injustice was being done to the great body of the people who could not afford the cost of these expensive proceedings. As a result, the Act of 1857, known as the Matrimonial Causes Act was passed. During the discussion on the bill, the Attorney-General stated that the object was to create a new tribunal which may hereafter have to administer other laws made under happier auspices. The new court was composed of several judges, but subsequently power was given to a single judge. The sittings were to be held in London, Middlesex or elsewhere, but the latter provision was never carried into effect. The Act was amended at various times, and now the position of matters is that a husband may obtain a complete divorce on the ground that his wife has been guilty of adultery since marriage, but a woman can only get relief by shewing that the husband has been guilty of adultery coupled with such

cruelty as without adultery would have entitled her to a divorce *a mensa et thoro,* or adultery coupled with desertion, without reasonable excuse, for two years or upwards. There are four additional crimes named in the Act, each being of a grosser type of the same class, any one of which entitles the wife to an absolute divorce. But although the English Parliament has provided a certain degree of relief, it has been found that only people of means can avail themselves of the remedy, and the poor are still in the same hopeless condition as they were before the Act of 1857 was passed. As a result of public agitation, a Royal Commission was appointed in November, 1909, composed of very eminent men, who have made a thorough enquiry into the whole matter, and who have just lately presented their report, a copy of which I have read with the greatest care. The remedies and provisions suggested are of a very drastic and perhaps far-reaching character. I do not think all of them would be favourably received in this country, so I shall not deal with them in detail. Apart from various grounds on which a separation is recommended, the Commissioners find that in their opinion the law should be amended so as to permit of divorces being obtained on the following grounds: (1) Adultery; (2) Desertion for three years and upwards; (3) Cruelty; (4) Incurable insanity after five years' confinement; (5) Habitual drunkenness found incurable after three years from first order of separation; (6) Imprisonment under commuted death sentence. A number of grounds of a less serious character are named as being sufficient to support a judicial separation. A minority report was made, which I understand has received approval from a very high quarter in England. The minority report is that of the Archbishop of York, Sir William P. Anson, and Sir Lewis T. Dibdin, which differing on several grounds from the majority, agrees with some of the radical changes recommended by a large body of the Commissioners.

Looking at the character of these various grounds suggested for divorce, I am unable to see that any one is much less serious than the others. Adultery on the part of a married woman has

always been treated as a sin of the gravest character, but the conditions of social life have caused it to be considered less seriously on the part of the man. I am not concerned with the illogical result of such a situation. That it is so is sufficient for my contention. Continued desertion is as much a breach of the marriage obligation as adultery. Persistent cruelty may, and often is, the cause of greater suffering to the wife than anything else can be, and nothing can so degrade the relationship of man and wife as habitual drunkenness. Incurable insanity renders the afflicted incapable of performing the obligations of married life, and along with drunkenness generally visits the sins of the parents on the children of succeeding generations. Imprisonment for life under a commuted sentence is in fact a divorce to all intents and purposes from the marriage point of view. Wherein can we make a logical difference in the result? The man guilty of any of these crimes or subject to any of these conditions is not the man who entered into the state of matrimony. He is a different individual in relation to his wife, and no longer remains the same person as regards the original status which he and the woman created. A trustee is removed if he becomes insane, and the tie of guardianship is severed if the guardian is guilty of cruelty to his ward. A grossly immoral life is ground for annulling the tie which binds the clergyman to his church. Desertion compels the husband to pay alimony to an innocent wife, and sufficient cruelty warrants her in living wholly apart from the man to whom the law has bound her by every legal means in its power. Why should the law grant only a partial remedy in cases of this kind? Why not grant complete relief when grave wrongs are admitted to exist, and great danger likely to result from the continuance of a condition condemned by the law and only feebly remedied? Social and sentimental reasons do not affect the question. Divorce is not the cause of the looseness of married life. Rather it is the logical outcome of wicked and sinful men and women, whose immoral lives are the result of a licentious and unholy system of living and a condition springing from the corrupt and degenerate ten-

dencies of humanity. Society has much to answer for in this connection, especially when we find, as we do, that apparently a large and influential class, instead of dealing out justice to the sinner, winks at his lapses, and welcomes him as a family guest. The remedy does not lie in preventing divorce. The true remedy consists in an exaltation of life.

For my own part, I am induced for the reasons therein given to follow the report of the majority in its main features, and I cannot see that the enlargement of the causes for divorces along the lines indicated would produce the evils which some people think would result from the changes proposed, if carried into effect. The state of the divorce laws in the United States is not relevant. The conditions are entirely different, and the easy methods of getting a divorce in many of the States are not contemplated here. We look only for sound, conservative and substantial grounds on which a divorce may be granted, and not for the creation of a court too readily available to the man or woman who is tired of married life, or whose respective tempers may not harmonize, nor should we advocate remedies so difficult and costly as to make the court a millionaire's tribunal.

This brings me to the question of the constitution of the court itself. It is manifest that on the trial of issues of pure fact, judges who are experienced in weighing evidence are best qualified to deal with matrimonial causes. Many of the members of the Divorce Committee of the Canadian Senate are laymen. They are engaged in business or callings which are quite foreign to the conception and consideration of the probative force of evidence. A few hours of each session, and an experience only extending over the time they have been members of the Senate, represent the training available to them, and it cannot be expected that they could analyze, weigh and estimate the value of the statements made by witnesses as a judge can do in the light of varied and daily experience, and with that knowledge and penetration, which are the product of half a lifetime at the Bar, and later, on the Bench. It is true there are lawyers on the Committee, but there is not, and cannot be the same searching

enquiry, the same judicial quality which we expect, and get from the trained and experienced jurist.

I have, therefore, come to the conclusion that we should have a purely judicial tribunal for divorce cases, composed of at least three judges, in order to lessen the danger of unconscious reasoning of a dogmatic tendency. They should be of the province in which the parties to the marriage reside, and on the general question there should be the right of appeal to the Supreme Court of Canada. Each province should be divided into districts, and the court should sit as often as expedient for the causes. They should also have power to deal with separation on well-defined grounds as set out in the report to which I have referred. If this method were adopted, the court would be available to the labourer as well as to the millionaire, and there would be practically a certainty of justice being done without any danger of the heavens falling. The procedure should be of the simplest and least expensive character, and power ought to be given to the court to assess in favour of an innocent wife, reasonable damages against her husband. The rules of evidence should be stringently applied, and the strictest proof of the merits should be demanded when the case is being tried, whilst the cost and means of getting to trial should be moderate and within the reach of worthy suppliants seeking only justice.

What other suggestion may be made? There is one of importance, and I think of great value, although I hesitate to advance it at present, because it might tend to weaken my main contentions in the minds of some of those who, on the whole, may agree with me. It is this,—In every case where the husband is found guilty of the offences, or any of them, which warrant an absolute decree against him, and a dissolution of the marriage, a punishment ought to be imposed. Let us compare other conditions of the law with the misdeeds which ought to warrant a divorce. A violation of a snow by-law carries with it a fine. A trifling matter from a moral standpoint may be ground for imprisonment. The stealing of a loaf of bread for a starving family sends a man to gaol. Yielding to temptation and taking

some trifling article from a bargain counter is penalized by perhaps a month in a cell. But the gravest of crimes against Divine laws, and a vicious defiance of the well-recognized principles of morality, are allowed to go unpunished and treated as a matter only of scandal and idle gossip. There should be some deterrent, some dread of the future consequences ever present to the mind of a man who has taken a young girl from her home under a promise to protect and provide for her as a wife, and who, in violation of this, has used her as an unresisting object on which he could vent his anger and exercise his cruelty. If proved, why should not the tribunal have the right to punish? A witness who clearly commits perjury in the box is dealt with at once, and a judge orders that he be forthwith arrested and prosecuted for the crime. Half a dozen serious crimes may be proved on divorce proceedings, but the man goes free, and a judgment is given, a Committees' report is made, or a private Act passed, granting him that result which, but for his own misconduct, he would perhaps have cheerfully applied for on his own account.

I do not think there is anything more I could say to advantage. I believe as much as any one does in the sanctity which ought to exist in connection with the marriage relation, and the care we ought to exercise in dealing with the question I have discussed, but in a matter of this kind, if that sanctity has been desecrated by either husband or wife, or by both, it no longer exists, and the marriage relationship is a hollow mockery and a thing defiled. And when it is found by proper judicial enquiry that one of two lives is blasted and that death itself would be a relief, it surely cannot be argued that a tribunal which pronounces bare justice, is acting contrary to the laws of God or the higher principles of modern civilization.

THE GREAT PROBLEM.

An event of such importance as that disclosed in the debate on the Naval Bill on the fifth of last month can hardly be passed over in silence even by a journal which keeps aloof from all questions of a political nature. That the time has come when this country should take some share in the general defence of the Empire is admitted by all; the only matter of controversy being the form in which such action should be taken. With this we are not concerned. It is to the great constitutional principle, now for the first time assuming practical shape, that the acceptance of responsibility for Imperial Defence must carry with it the right to share in the direction of Imperial Foreign Policy, that we would call attention.

The course of events has brought to the minds of the peoples of the self-governing colonies, as well as of the parent State, that the difficult problem of combining the principle of autonomy on the one side with the duty owing to the Empire on the other, must be solved, or the Empire can no longer exist. The mistress in her own house must shew herself ready to play the part of a daughter in her mother's. Happily the principle is accepted on all sides. The leaders of both political parties in the Imperial Parliament admit that if the Dominions take part in the work they must be allowed to have some say as to the planning of it. The leaders of both parties in this country claim that if they undertake to share Imperial responsibility they have a right to take part in Imperial Councils. With all parties thus agreed in laying the foundation stones there may be difficulties, but there should be no impossibility in rearing upon them the Imperial edifice which all hope to see complete, and fully realizing the ideas which it embodies.

There need be no apprehension as to the result. The British people, while tenacious of their rights, are the last to engage in aggressive warfare. For centuries they have not done so, and with the enormous interests at stake they are not likely to do so now. Sacrifices may be required but they should be cheerfully

accepted. Nothing was ever gained without sacrifice. Lastly, may we not believe that Providence has ordained the British Empire for some nobler task than the acquisition of territory, and the accumulation of wealth, and that this binding together of its component parts is a further step in some grand design in which all will be called to play a part worthy of the British name and nation.

The Naval Bill which has brought these matters under our consideration is as follows:—

2. From and out of the Consolidated Revenue Fund of Canada there may be paid and applied a sum not exceeding thirty-five million dollars for the purpose of immediately increasing the effective naval forces of the Empire.

3. The said sum shall be used and applied under the direction of the Governor in Council in the construction and equipment of battleships or armoured cruisers of the most modern and powerful type.

4. The said ships, when constructed and equipped, shall be placed by the Governor in Council at the disposal of His Majesty for the common defence of the Empire.

5. The said sum shall be paid, used and applied and the said ships shall be constructed and placed at the disposal of His Majesty subject to such terms, conditions and arrangements as may be agreed upon between the Governor in Council and His Majesty's Government.

Whether this is the best form for the aid to take is a question for the Dominion Parliament to decide. There is a difference of opinion as to this, but all agree that something adequate should be done in the premises.

W. E. O'BRIEN.

ALLOWANCES TO TRUSTEES AND EXECUTORS IN ONTARIO.

At one time the rule was that trustees, executors and others standing in similar position could not charge anything for their services. This was upon the principle of equity, that a trustee could not profit by his trust. Otherwise, it was said, the trust estate might be loaded and rendered of little value and the trustee put in a position where his interest and his duty would conflict.

This rule was first relaxed in favour of persons acting under a will or letters of administration, by 22 Vict. c. 93, s. 47 (C.S.U.C. c. 16, s. 66), as follows: "The judge of any Surrogate Court may allow to the executor or trustee or administrator acting under will or letters of administration a fair and reasonable allowance for his care, pains and trouble and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under any will or letters of administration, and in administering, disposing of and settling the same, and generally in arranging and settling the affairs of the estate, and therefore, may make an order or orders from time to time, and the same shall be allowed to an executor, trustee or administrator in passing his accounts."

Then followed 37 Vict. c. 9, which was in effect: "Any trustee under a deed, settlement or will, and executors and administrators, and any guardian appointed by any court, and a testamentary guardian, or any other trustee, howsoever the trust is created . . . shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate, as may be allowed by the Court of Chancery, or any judge or master thereof, to whom the matter may be referred." Thus, was virtually abrogating in Ontario the above equity rule.

The two enactments were consolidated in R.S.O. (1877), c. 107, as ss. 36 to 41 and continued, in pari materia, in R.S.O.

(1887), c. 110 as ss. 38 to 42, and in R.S.O. (1897), c. 129 (The Trustee Act) as ss. 40 to 44, of which 40 and 43 were as follows:—

"40. Any trustee under a deed, settlement or will, any executor or administrator, any guardian appointed by any court, and any testamentary guardian, or any other trustee, howsoever the trust is created, shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate, as may be allowed by the High Court or judge, or by any master or referee thereof, to whom the matter may be referred.

"43. The judge of any Surrogate Court may allow to the executor or trustee or administrator acting under a will or letters of administration, a fair and reasonable allowance for his care, pains and trouble, and his time expended in or about the executorship, trusteeship or administration of the estate and effects vested in him under the will or letters of administration, and in administering, disposing of, and arranging and settling the same, and generally in arranging and settling the affairs of the estate, and may make an order or orders from time to time therefor, and the same shall be allowed to an executor, trustee or administrator in passing his accounts."

The original of the enactment which enables executors and others to pass their accounts in the Surrogate Court was 59 Vict. c. 20, s. 5, incorporated into the revision of 1897 as s. 72 of c. 59, thereof (The Surrogate Courts Act), which, as subsequently amended by 2 Edw. VII. c. 12, s. 11 and 5 Edw. VII. c. 14, s. 1, is now s. 71 of 10 Edw. VII. c. 31 (The Surrogate Courts Act), since amended by 1 Geo. V., c. 17, s. 71, and is, in part, as follows:—

"71—(1) Where an executor, administrator, trustee under a will of which he is an executor or a guardian, has filed in the proper Surrogate Court an account of his dealings with the estate and the judge has approved thereof in whole or in part, if he is subsequently required to pass his accounts in the High Court, such approval, except so far as mistake or fraud is shewn,

shall be binding upon any person who was notified of the proceedings taken before the surrogate judge, or who was present or represented thereat, and upon everyone claiming under any such person. (2) A guardian appointed by the Surrogate Court may pass the accounts of his dealings with the estate before the judge of the court by which letters of guardianship were issued."

The jurisdiction of Surrogate Court judges to make allowances to trustees, executors, etc. for their services was greatly extended by s. 18 of 63 Vict. c. 17, subs. (1) thereof adding to the Trustee Act of 1897 a new section, 28*a*, which, as amended by 3 Edw. VII. c. 7, s. 26, read: "A trustee appointed by any deed, will or other instrument in writing, or by an order of any court desiring to pass the account of his dealings with the estate to which he is a trustee may file his accounts in the office of the Surrogate Court . . . and thereupon the proceedings and practice upon the passing of the said accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the Surrogate Court . . ., and subs. (2) thereof amending the above s. 40 of the Trustee Act (1897), by inserting after the word "judge" therein, the words "or Surrogate Court judge"—thus extending to Surrogate judges, in the cases of all the trustees named in subs. (1) who chose to file and pass their accounts in the Surrogate Court, the same jurisdiction to make such allowances as the High Court or any judge thereof possessed.

The whole statutory law on the subject is now comprised in s. 66 of the Trustee Act of 1911 (1 Geo. V. c. 26), as follows:

"66—(1) A trustee shall be entitled to such fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate, as may be allowed by a judge of the High Court, or by any master or referee, to whom the matter may be referred. (2) The amount of such compensation may be settled although the estate is not before the court in an action. (3) The judge of a Surrogate Court in passing the accounts of a trustee under a will or of a personal representative

or guardian, may from time to time allow to him a fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the estate. (4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be deemed fair and reasonable in respect of such services. (5) Nothing in this section shall apply where the allowance is fixed by the instrument creating the trust."

This last Act, as will be found, revokes the extended jurisdiction which had been conferred by 63 Vict. c. 17, s. 18, and 3 Edw. VII. c. 7, s. 26, upon Surrogate Court judges and restricts their jurisdiction again, as before these latter enactments, to the cases of "a trustee under a will, or of a personal representative or guardian" when passing his accounts under sec. 71 of "the Surrogate Courts Act."

The allowance to be made in all cases is, what is fair and reasonable for the trustee's care, pains and trouble, and his time expended in or about, the estate.

Quoting the words of Chancellor Boyd in *Re Fleming* (1886) 11 P.R. 426: "The statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits, according to the sound discretion of the judge, who is to regard the care, pains, trouble, and time bestowed and expended by the claimant. Nor have the courts laid down any inflexible rule in this regard. While a percentage has been usually awarded as a convenient means of compensating a class of services which do not admit of accurate valuation, yet the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute . . . Five per cent. may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility such a rate may be excessive."

The last case upon the subject is *Re Griffin* (1912), 3 O.W.N. 1049, where a Divisional Court, composed of Mulock, C.J.Ex.D.

and Clute and Sutherland, JJ. reversed the decision of Middleton, J., 3 O.W.N. 759, who had reduced to $815.73 the amount of $3,000 which the Surrogate judge of the county of Lambton had allowed as compensation to executors. In delivering the judgment of the court, the Chief Justice says, at p. 1050, "There is no fixed rate of compensation applicable under all circumstances for services of executors and trustees. They are entitled to reasonable compensation; and what is reasonable compensation must be governed by the circumstances of each case: *Robinson* v. *Pitt*, 2 W. & T.L.C. Eq. 214. Various authorities upon the subject are collected in Weir's Law of Probate, p. 389 et seq. An examination of the cases there cited shews the following allowances to executors according to circumstances. In some instances they have been given a commission on moneys passing through their hands, varying from one to five per cent.; in others a bulk sum; in others a commission and a bulk sum; in others an annual allowance in addition to or exclusive of commission."

Mr. Weir's book, commencing at p. 486, furnishes a compendium of cases down to time of its publication. Other cases and the later ones are:—

Williams v. *Roy* (1885), 9 O.R. 534. By his will the testator authorised his two executors "to retain for their own use and benefit the sum of $200 each in lieu of all charges for their services in performing the duties hereby imposed on them as the executors of this my will." Chancellor Boyd, distinguishing, if not over-ruling, *Denison* v. *Denison* (1870), 17 Grant 306, held that having accepted probate of the will, the executors could not afterwards be granted additional compensation to that so provided by the testator. The Chancellor points out in his judgment the different courses which may be taken where executors are dissatisfied with the provision in their favour made by the testator.

Re Farmers Loan and Savings Co. (1904), 3 O.W.R. 837 was an application to Falconbridge, C.J.K.B.D., by the liquidators of this company for remuneration in winding same up.

The Chief Justice stated, as clear, the rule that a trustee, or person in the position of a truste, was entitled by way of comperson in the position of a trustee, was entitled by way of remuneration for his services to a commission upon the corpus of the estate coming into his hands and finally distributed by him, but payable only when distribution actually takes place, from time to time, and he may be entitled, in addition, to a reasonable annual allowance for care and management of the estate, or, instead, he may be allowed a lump sum, to include and cover both commission and annual allowance, or either of them; also that the usual rate of commission, when allowed, is 5 per cent.

Re Toronto General Trusts & Cent. Ont. Ry. Co. (1905), 6 O.W.R. 350. The trustees having resigned, an order was made releasing them, dispensing with passing their accounts and referring it to Mr. Cartwright, official referee to determine "what compensation, if any, (they) are entitled to for their care and pains, trouble and time expended in and about the execution of the said trusts." Except as repository of a mortgage and trust title, the trustees had not been in possession of the trust estate, had not collected or disposed of any money, had not been required to assume any supervision or control of the trust property and had not taken any steps to protect or preserve the trust property, save in prosecuting two actions and defending another brought against themselves, which litigation had been in charge of their own solicitors whose costs the railway company had paid or provided for. Mr. Cartwright allowed them as compensation the sum of $14,000. On appeal to Mr. Justice Teetzel, he reduced the amount to $1,500, and, in the course of his judgment, enunciated these as the circumstances which, in his opinion, ought to be taken into consideration in all cases in fixing the amount of compensation:—

(1) The magnitude of the trust; (2) the care and responsibility springing therefrom; (3) the time occupied in performing its duties; (4) the skill and ability displayed; and (5) the success which has attended its administration.

Re Prittie Trusts (1908), 12 O.W.R. 264. In this case, Mr. Justice Britton adopted and approved of, as the rules which

should govern, the five cardinal considerations propounded by Mr. Justice Teetzel in last case. He added: "The compensation, where work has extended over years, should not be confined to an allowance by way of percentage, but it is proper to make an annual allowance. The amount depends upon the nature of the property, the degree of care, the extent of responsibility, etc."

Saskatchewan L. & W. Co. v. *Leadley* (1909), 14 O.W.R. 426, is a judgment of Mr. Hodgins, late Master in Ordinary, wherein he cites and acts upon what the late Mr. Justice Street said in *Re Williams* (1902), 4 O.L.R. 501: "I think we are warranted under the decision in *Re Berkley's Trusts* (1879), 8 P.R. 193, and the authorities there referred to, in holding that the remuneration of trustees whose duties cover a period of years, should not be confined to an allowance by way of percentage for the collection and payment over of income, but that it is proper to make to them an annual allowance for their services in looking after the corpus of the fund, receiving repayments upon principal and re-investing it." And the learned master in ordinary added: "The general rate of compensation to executors and trustees in Ontario is five per cent. on the annual receipts, but may be less."

Re Patrick Hughes (1909), 14 O.W.R. 630 is a judgment of Denton, Co.J., under the extended jurisdiction which had been conferred upon Surrogate Court judges by 63 Vict. c. 17, s. 18, and 3 Edw. VII. c. 7, s. 26, but which, as already stated, has been revoked by the Trustee Act of 1911. He referred to the judgment of Mr. Justice Street in *Re McIntyre* v. *London and Western Trusts Co.* (1904), 7 O.L.R. 548, where the latter, after stating generally the law that trustees are not entitled to an allowance for merely taking over an estate, but only for taking over and distributing, proceeds: "I think they should be allowed 2½% upon such portions of the corpus of the estate as they have taken over and distributed, and that as the remainder of the corpus which they have taken over is distributed, they should be allowed a like allowance of 2½% upon the portions

distributed from time to time . . . I think this allowance should not be treated as earned, until the sums received are also distributed."

After stating the facts of the case, that the widow was entitled during her lifetime to $1,000 annually from the income of the estate and that consequently there could be no distribution of the corpus till her death, the learned County judge said: "When that event happens, the present trustee, if then trustee of the estate, will, or ought to be, allowed on passing of its accounts a commission on the amount so realised. The reason for withholding the commission in such a case is that the duties of the trustee are not as yet wholly performed. They are only half performed. The commission is earned as soon as the other half (the more important half to the beneficiaries) is distributed among the persons entitled."

Re Griffin (1912), 3 O.W.N. 1049 has been already noted ubi supra.

Subject to the above five cardinal considerations formulated by Mr. Justice Teetzell and approved and adopted by Mr. Justice Britton, the following propositions seem to be established by the cases:—

1. The remuneration or compensation usually allowed to trustees, executors, etc., for their services is a percentage commission, varying from one to five per cent. upon the amount of the estate passing through their hands.

2. But as remuneration is not to be considered as earned until the assets of an estate have been both got in and distributed, commission should be allowed, or at any rate paid, only upon the amount from time to time actually disbursed or distributed, or presently to be distributed.

3. Prima facie the rate of such commission should be 5%, "but where the estate is large and the services rendered are of short duration and involving no very serious responsibility such a rate may be excessive." The rate should then be either one, less than 5%, or be upon a sliding scale similar to that in the cases of commission in lieu of taxed costs in administration

and in partition matters under Con. Rule 1146, or of sheriff's poundage under tariff C. to Con. Rule 1189.

4. But, instead of commission, a lump sum may be allowed as the remuneration. A lump sum may also be allowed in addition to commission for services which appear to be outside those covered by the commission. And, where the services extend over a period of years, an annual sum for the general care and management of the estate should be allowed, in addition to the commission.

5. For the investment and re-investment of the funds of an estate, the proper mode of remuneration is not by commission, but by the allowance of a stated sum or sums, annually or otherwise, confining the allowance of commission to the receipts and expenditure of income.

6. Where an agent has been employed and paid for such work as is usually entrusted to an agent, such as collecting rents, etc., some compensation should still be allowed the trustee or executor in respect thereof because of the care and responsibility incident thereto.

7. If a legacy is given by the testator to his executor as compensation for his services, the executor cannot after acceptance of probate, claim more; but if the legacy is reasonable in amount, and to the extent that it is reasonable in amount, as compensation, it will not abate with other legacies, upon a deficiency of assets, and will take precedence of creditors' claims.

8. In the case of a specific legacy to an executor, the assumption is that it was given in respect of his services, but the same inference is not to be drawn from the gift of a share in the residue, in which case additional compensation may be allowed if the amount of the share prove to be inadequate.

9. Commission is not allowed upon sums which have not in fact been realised by the executor or trustee, but which are charged against him in consequence of neglect or misconduct.

10. Allowances to trustees and executors, like other expenses of administration, come out of the aggregate of the estate, but after the share of a beneficiary, payable at some future time,

has been segregated from the rest of the estate, the expenses and compensation in respect thereof must be borne by such share.

11. Mere mistake of judgment, lack of skill in keeping the accounts, or even the fact that the trustee or executor is found indebted to the estate, will not alone disentitle him to compensation. Only where there has been actual dishonesty, or other serious misconduct, on his part, will he be entirely deprived of some remuneration.

12. Where there are several trustees or executors entitled to share in the total remuneration allowed, it is to be apportioned between them according to the relative values of their respective services.

GRAY v. WILLCOCKS.

An Old Cause Célèbre.

Ontario solicitors who issue writs of fi. fa. as of course do not in general know of the troubles of their predecessors in issuing process during the first years of the existence of Upper Canada. When the Court of King's Bench was first instituted by the Provincial Statute of 1794, 34 Geo. III. c. 2, no subject had any transferable property in land within its jurisdiction, but that was soon a thing of the past, and the Court ordered a writ of fi. fa. against goods and lands as, of course, in any judgment, under the provisions of the Act of 5 Geo. II. which made lands in the Plantations or Colonies subject to simple contract debts, and provided (sec. 4) that in satisfaction of all debts established by judgment of the courts such execution as would go against goods and chattels should operate also against lands and tenements. This was, of course, a marked departure from the English writ of Elegit.

Then came the Provincial Act of (1803), 43 Geo. III. (U.C.) c. 1 (assented to by the King on January 4, 1803, after being reserved) which provided that a writ of fi. fa. should issue in the first instance only against goods a fi. fa. (lands) should not issue till after the return of the fi. fa. (goods) and the sheriff

was not to sell until after 12 months from the time he received his fi. fa. (lands). After this Act the clerk issued a fi. fa. (goods), as of course, without consulting the court, but deemed it requisite to receive further order before he issued the execution against lands.

John Gray had obtained judgment against William Willcocks. In Michaelmas Term, 46 Geo. III., Nov. 6, 1805, Mr. Scott (afterwards Attorney-General and Chief Justice) obtained from the court (Powell and Thorpe, JJ.) a rule calling upon the defendant to shew cause why a fi. fa. (lands) should not issue, on the judgment in debt, the fi. fa. (goods) being returned, and it was directed that the Rule should be personally served on the defendant. After an enlargement, the matter was argued, and on Jan. 13th, 1806, the court divided, Powell, J., being in favour of the issue of the fi. fa. (lands), but Thorpe, J., holding that such a writ could not validly be awarded. This was the third time the point had been argued. The first time, Allcock, J., had held that the writ should not, Powell, J., that it should issue. The second time, Allcock, C.J., and Cochrane, J., considered that it should not, Powell, J., that it should issue.

This time the matter went to the Court of Appeal. This court sustained Thorpe, J.; and the plaintiff appealed to the Privy Council. The Board on February 15, 1809, reversed the Court of Appeal. On July 13, 1809, the Court of Appeal remitted the record to the Court of King's Bench, in order that a writ of execution "should issue against the lands and tenements of the defendant for satisfaction of the plaintiff's debt and judgment," and on July 14, 1809, Mr. Justice Powell had the satisfaction of sitting in court (composed of Scott, C.J., and himself) when a fi. fa. (lands) was directed to issue in accordance with his opinion.

And so *Gray* v. *Willcocks* is a leading case, of which not one Ontario lawyer in a hundred has ever heard.

There never has since been any question as to the liability of lands to execution; the only question has been, "what is

land?"* The Legislature has extended the meaning at various times by Statute.

Mr. Justice (afterwards Chief Justice) Powell's reasons for judgment are to be found in a very rare pamphlet (not dated) printed by R. Stanton who became King's Printer at York, U.C. about 1824.†

WILLIAM RENWICK RIDDELL.

MERCY AND JUSTICE.

The senior of the three junior county judges of the county of York has been posing recently as a sort of judicial Santa Claus. He seems to be so saturated with the milk of human kindness as to forget that he is a judge sworn to administer the laws of the land.

In a case that came before him last month a woman was indicted for stealing a number of articles from a departmental store. So far as the newspaper report of the case goes, there seems to be no doubt as to her guilt and no excuse of poverty; but it did appear that she was good looking, well attired, and the wife of a Sunday school teacher. The learned judge seemed to think that under such circumstances she ought to go on suspended sentence. That he had some slight sense of his duty is apparent from his observation, that he "expected that the sentence would bring a shower of comment" on him. Those who have followed the judgments and sentences of this learned judge in criminal matters do not always take him seriously, but, as he apparently expects comment from somebody, we are

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*Perhaps this is not quite accurate. The question arose as to whether lands in the hands of the heir were liable to execution for the debt of the ancestor, on a sci. fa.—and it was held in the negative. *Paterson* v. *McKay* (1823), Taylor's Rep. 43 (Praes. Powell, C.J., Boulton and Campbell, JJ.).

†In a letter dated at York, February 5th, 1826, from Miss Anne Jane Powell to Mary Powell, her cousin, she says, "Mr. Fothergill has been dismissed the printing business and young Mr. Robert Stanton appointed in his stead."

pleased to accommodate him by asking if there has been any repeal of the Criminal Code as regards theft, and why a well dressed and good looking woman, who must have known that she was breaking the eighth commandment (it does not appear whether she attended her husband's Sunday School class) should be let off when men or women less favoured and with less advantageous surroundings are sent to jail for similar offences? In the above case he perhaps looked upon the woman as a kleptomaniac and not altogether responsible; but, whilst the public might be pleased that she was not severely dealt with, such pleasure as well as a desire to find an excuse for this dispenser of justice (with blinded eyes it may be, but without a sword or pair of scales) is marred by the alleged fact that out of about fifteen cases of shoplifting brought before him during a couple of weeks of last month, there was not one punishment. Other records equally startling might, it is commonly said, be cited.

Another judgment of this learned judge, which, if the evidence given in the newspaper reports be correct, cannot be overlooked. We refer to the prosecution of a cabman in the city of Toronto for over-charging and defrauding a foreigner to the extent of a considerable sum. It appears that this cabman having received two dollars from the foreigner to take him a distance of a mile or so from the railway station, when they arrived at their destination he demanded a further sum of a like amount. As the traveller had only a single one dollar bill and five gold pieces, equal to about twenty dollars, the cabman cheerfully pocketed the lot, the unfortunate and ignorant foreigner being told that the gold pieces were only worth about twenty cents each. In the face of this, his Honor is said to have remarked, "the circumstances are very suspicious, but I will give you the benefit of any doubt," and acquitted the prisoner.

Another case is that of a servant girl who had stolen from her employer, and who it is reported had been dismissed for theft from every situation she had been in for a number of years. She received the paternal advice to be good in future, and was again let loose on society.

It is not seemly that a paragraph such as the following, introduced with large capital letters, should appear in a respectable daily newspaper:—

"Asked to be tried by Judge Morgan. Popularity of His Honour practically renders jury unnecessary. Since Judge Morgan has presided in the Criminal Sessions at the City Hall trial by jury has almost been eliminated. Out of a total of 96 cases in which the grand jury returned true bills, since the sitting of the court, only three prisoners have gone to a jury."

Why do alleged criminals ask to be tried by Judge Morgan—and how is his popularity to be accounted for?

If the facts as stated in the public press be correct it is clear that such travesties of justice as these should not be permitted to continue, and to that end it would seem desirable that the responsible authorities should enquire into the correctness of these reports and if found to be substantially true, to apply some appropriate remedy. If not true they should be contradicted. Public safety requires that the administration of justice should be sure, certain and swift; it certainly should not be brought into contempt and ridicule.

RIGHTS OF LIQUIDATORS IN PROPERTY OF INSOLVENT COMPANIES.

It would seem that there is in the minds of some members of the profession, an erroneous impression as to the nature of the title of a liquidator, under the Winding-up Acts, to the property of the company in respect of which he is appointed liquidator. It is assumed by some, that the effect of the order, appointing a liquidator under the statute, is to vest the estate of the insolvent company in the liquidator, and that, in case of a sale of the property, he is the person to convey. If, however, we look at the Dominion Winding-up Act (R.S.C. c. 144), and we believe most provincial Winding-up Acts are similarly framed, we do not find anything in the Act vesting or authorizing the court to vest the estate of the insolvent company, in the

liquidator. By section 33 he is empowered to take all the property of the company into his possession and by section 34 divers powers in reference thereto are conferred upon him, including a power of sale.

But, assuming a sale is made by a liquidator, the proper party to convey is not the liquidator, but the company, although of course the liquidator is a proper and necessary party to the deed. That seems to be the recognized rule in England: see Bythewood's Precedents, vol. 12, Nos. 207, 208, 209. We mention this circumstance because recently a case went up to the Supreme Court from Ontario, in which a sale by a liquidator was in question, in which all parties appeared to have treated the matter as if the estate of the insolvent company was vested in the liquidator; and as if he were the vendor and responsible as such for defects in title. But, when the property of an insolvent company is sold under the authority of the court by a liquidator, there seems to be no more reason for holding that he is personally liable as the vendor, than there is for holding that a master of a court carrying out a sale under a judgment of the court is so liable.

The liquidator is an officer of the court appointed to realize the assets and for that purpose to act as the agent of the company in selling its property, but in such circumstances it is the company, and not the liquidator, who is the real vendor, and the conveyance must, in order to vest the legal estate in the property sold, be made by the company. The liquidator does not assume a personal responsibility for the title, and if a good title cannot be made, it is the assets of the company which must be resorted to, and not the liquidator, unless, perhaps, where he has held himself out to the public as the vendor.

Similar erroneous views we have reason to know prevail in regard to the position of a committee of the estate of a lunatic who is also assumed to have the lunatic's estate vested in him, whereas his true position is merely that of a guardian; and in the event of a sale being ordered, the conveyance should be made by the lunatic, the committee being also a party and

usually being empowered to execute it on the lunatic's behalf:—Mistakes of this kind as to the person conveying may not seem very important. The trouble about them is, that it may become material at some future time to decide in whom the legal title is vested, and the question may arise when, it may be very difficult and perhaps impossible to rectify the mistake; this, from a lawyer's point of view, may be regarded as one of the advantages of our system of conveyancing, though it can hardly be thought so from the client's standpoint.

AUTOMOBILES — RESPONSIBILITIES ATTACHING TO.

A recent case decided a few months ago in the Province of New Brunswick, *Campbell* v. *Pugsley*, which appears on pp. 177, 178, of vol. 7, of Dominion Law Reports, gives a useful summary of the responsibility attaching to the use of these dangerous machines. We copy the headnote of the case. The authorities for the various propositions will be found in the report:—

While the automobile is not dangerous per se, its freedom of motion, speed, control, power, and capacity for moving without noise give it a unique status and impose upon the motorist the strict duty to use care commensurate with its qualities, and the conditions of its use, especially since the dangers incident to the use of the motor vehicle are commonly the result of the negligent or reckless conduct of those in charge and do not inhere in the construction and use of the vehicle so as to prevent its use on the streets and highways.

The driver of an automobile is to be considered in law as being in charge of a dangerous thing, and so called upon to exercise the greatest care in its operation.

Where an automobile on the highway is meeting a horse and buggy and the car is frightening the horse and the motorist sees or ought to see this, it is the legal duty of the motorist to stop his car and take all other precautions as prudence sug-

gests and this irrespective of any statute regulating and controlling the use of motor vehicles and whether or not the driver of the horse holds up his hand to indicate the trouble with the horse; and the greater the danger capacity of the car the greater is the degree of care and caution incumbent on the motorist in its use and operation.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and under the provisions of the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. c. 19, s. 4, s-s. 4, the motorist, violating its provisions in not stopping his car, incurs a fixed penalty by way of fine for the violation, this penalty is additional to, not in lieu of, civil damages to the person injured by the motorist's negligence.

Where an automobile is meeting a horse and buggy on the highway and is frightening the horse, and fails to comply with the direct provisions against negligence enacted by the Motor Vehicles Act (N.B.) 1911, 1 Geo. V. c. 19, his violation constitutes evidence of negligence.

The statutory requirements of the Motor Vehicles Act (N.B.), 1 Geo. V. c. 19, for the public regulation and control of the use on highways of automobiles, do not limit or interfere with the common law remedy for negligence, but they give other remedies directed to other ends.

In an action by the plaintiff for personal injury for negligence against the driver of an automobile on meeting a horse and buggy on the highway, and the consequent frightening the horse, it is not contributory negligence by the plaintiff to whip up his horse and pass the motor car on the embankment side of the road, where the evidence shewed that the plaintiff was accustomed to driving horses and that the means he took, by using the whip, to urge his horse ahead and keep it on the road, were reasonable and proper under the circumstances, and that the law of the road in New Brunswick required the plaintiff to pass on the left-hand side where the embankment was.

Where the Motor Vehicle Act (N.B.), 1 Geo. V. c. 19, s. 3, s-s. 4, provides that in case a horse appears "badly frightened" in meeting a motor the motorist shall stop the car, it is a question for the jury to determine upon the evidence, in a negligence action against the motorist, just what may be the condition that should be termed "badly frightened."

Where a motor collides with a waggon and in a negligence action against the motorist, the jury assess damages against him taking into consideration upon the evidence (1) repairs to the waggon; (2) necessary painting and that it would still be a patched-up waggon; (3) a valuable horse made lame and still lame; a verdict of $100 will not be disturbed as excessive.

That automobiles are vehicles of great speed and power, whose appearance and puffing noise are frightful to most horses unaccustomed to them, and that from their freedom of motion laterally they are much more dangerous than street cars and railroad trains, are elements of danger calling for the utmost care and caution to protect the public in their operation.

In a recent number of the Ontario Weekly Notes, Mr. Justice Middleton calls attention to an incident shewing the very loose manner in which criminal justice is frequently administered in that province. In giving judgment in *Re Holman and Rea,* he gives an illustration of the evils sometimes resulting from County Crown Attorneys engaging in general practice, and states his opinion that it is unfortunate that they should be allowed so to do. This is a matter which has been referred to before, and might well engage the attention of those whose duty it would be to make a change in that direction should it be thought that a change is desirable.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Garrow, Maclaren, Meredith, and Magee, JJ.A., Lennox, J.] [Nov. 19.

REX *v.* MURRAY AND FAIRBAIRN.

Criminal law—Two defendants—Appeal under s. 1021 *of Crim. Code—Meaning of "verdict"—New trial.*

Motion for a new trial by defendants, on consent of the Junior Judge of Middlesex, who tried the case under 1021 of the code. Both defendants were convicted of burglary.

Held, 1. The cases of the two appellants should be considered separately on their respective merits, following *Rex* v. *Mambey*, 6 T.R., p. 368, notwithstanding *Reg.* v. *Fellowes*, 19 U.C.R., p. 54.

2. Quære, whether, under s. 1021 of the Criminal Code the use of the word "verdict" limits the operation of the section to cases tried by a jury. But although strictly and accurately the word "verdict" is only applicable to the finding of a jury, or of a judge sitting as a jury on the question of fact, the point not having been taken by the Crown, it was not passed upon, the prisoner being given the benefit of the doubt, and a new trial was granted to one of the appellants.

J. R. Cartwright, K.C., for the Crown. *P. H. Bartlett*, for defendants.

HIGH COURT OF JUSTICE.

Boyd, C.] [Nov. 8.

TOWN OF WATERLOO *v.* CITY OF BERLIN.

The Ontario Railway and Municipal Board—Jurisdiction.

A formal agreement between municipalities which is not of a voluntary character but which is executed in conformity with a

direction of the Ontario Railway and Municipal Board as to the operation of a municipal railway is within the exclusive jurisdiction of the Board as to adjustment of differences arising thereunder between the municipalities in the accounting for the profits of the operation of the road, and an action in the High Court will be dismissed.

A. B. McBride, for plaintiffs. *A. Miller,* K.C., for defendants.

Riddell, J.] [Oct. 24.

RE CANADIAN SHIPBUILDING CO.

Appeal—Granting leave to appeal—Matter of public importance—Liquidation of company.

Held, 1. Leave to appeal to the Court of Appeal on the ground that the question raised by the judgment of the trial court is of great public importance, will not be granted the liquidator of a company under ss. 101 (*c*) and 104 of the Winding-up Act, R.S.C. 1906, ch. 144, where the question involved is not of a common law or equitable right, but simply of the interpretation of a statute, and where such question is not one of frequent recurrence.

2. Leave to appeal to the Court of Appeal will not be granted the liquidator of a company under ss. 101 (*c*) and 104 of the Winding-up Act, from the decision of the trial court that the liquidator was not a creditor and as such entitled to the benefits of the Bills of Sale and Chattel Mortgage Act, where, if the judgment should be reversed, he could not prevail in the action unless he could successfully contend, as he must, in order to succeed, that the bills of sale under which the opposing party claimed, did not satisfy the requirements of such Act, and no case for leave to appeal on that branch of the case was made out.

J. A. Paterson, K.C., for the liquidator. *H. E. Rose,* K.C., for the company.

Province of Nova Scotia.

SUPREME COURT.

Sir Charles Townshend, C.J.] [Nov. 28.

IN RE DEBLAIR'S ESTATE.

Concurrent jurisdiction of Supreme and Probate Courts.

In the administration of estates the jurisdiction of the Supreme Court is concurrent with that of the Probate Court, and in matters of difficulty or importance it is desirable that questions should be dealt with in a summary way under the procedure in the Supreme Court, but where the application is needless or the amount small, costs will be refused.

Rogers, K.C., for executors. *Roscoe,* K.C., for creditors.

Full Court.] GORMLEY *v.* DEBLOIS. [Dec. 14.

Absent or absconding debtor—Prior and subsequent attachers —Right of latter to avail themselves of Statute of Limitations.

Under the provisions of O. 46, r. 6, which provides that a subsequent attacher may dispute the validity and effect of a previous writ of attachment on the ground that the sum claimed was not justly due, or was not payable when the action was commenced, the subsequent attacher may take the ground that the debt was barred by the Statute of Limitations as an answer to the claims of the previous attacher.

Where this is made to appear the Court will order the writ of attachment and also the judgment to be set aside.

D. Owen, for appellants. *Roscoe,* K.C., for respondent.

Full Court.] [Dec. 14.

MARITIME GYPSUM CO. *v.* REDDEN.

Contract—Action for money paid—Failure of consideration— Party's own default—Agreement not pleaded—Appeal.

A party is not entitled to recover back money paid for a consideration which has failed, where the failure has been caused by the party's own default.

An attempt to shew an agreement to return the money sought to be recovered cannot succeed where it is neither pleaded nor made a ground of appeal.

Roscoe, K.C., for plaintiff, appellant. *Sangster*, for defendant, respondent.

Bench and Bar.

Louis Edmond Panneton, of the City of Sherbrooke, Que. K.C., to be a puisne judge of the Superior Court of Quebec.

Some wag at Osgoode Hall has concocted the following epitaph anent recent changes in the courts of Ontario:—

SACRED TO THE MEMORY
OF
THE DIVISIONAL COURT
OF THE
HIGH COURT OF JUSTICE.
BORN 22ND DAY OF AUGUST, 1881.

DURING ITS CAREER
IT WENT THROUGH VARIOUS
TRANSFORMATIONS
AND
IN THE YEAR 1897
FINALLY
SETTLED DOWN TO ITS LATE FORM,
WHEN,
IN THE BLOOM OF YOUTH,
IT WAS PUT OUT OF EXISTENCE
BY
AN ACT OF THE PROVINCIAL LEGISLATURE.

ITS END CAME QUIETLY,
AND
WITHOUT A WORD OF FAREWELL,
IT PASSED OUT OF EXISTENCE
LIKE SMOKE,
ON
WEDNESDAY, THE 18TH DECEMBER, 1912,
IN THE THIRTY-SECOND YEAR OF ITS AGE.
R.I.P.

Canada Law Journal.

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COURTS FOR THE TRIAL OF MATRIMONIAL CAUSES.

At the recent meeting of the Ontario Bar Association, a paper was read by Mr. E. F. B. Johnston, K.C., advocating the establishment of a Divorce Court in this Province. There are not a few who appear to be rather adverse to this proposal, on the ground that the establishment of a Divorce Court would have a tendency to increase divorces, and gradually lead to a weakening of the marriage tie, a result not to be desired.

Mr. Johnston, however, dealt with the subject altogether from the standpoint of the desirability of changing the forum and simplifying procedure in divorce cases, in order to give the public greater facilities for procuring divorces. The application to the Dominion Parliament, now the only mode of obtaining the dissolution of marriage in some of the Provinces, is undoubtedly a remedy of which only the comparatively rich can avail themselves.

It would be well to remember, in considering the question of a Divorce Court for Canada, that there are other matrimonial causes besides divorce cases which need a proper tribunal for their disposition; and it is a question deserving of consideration as to whether, altogether apart from the question of divorce, duly constituted matrimonial courts are not now needed in each province of the Dominion.

That such a court has not been established before this in Ontario is due to the fact, that at the time of the first establishment of the Courts of Justice in that Province, matrimonial jurisdiction was, in England, administered in and by the Ecclesiastical Courts; and while the jurisdiction of the English Courts of law and equity was confined on the Provincial

Courts, only a limited part of the jurisdiction exercised in England by Ecclesiastical Courts was conferred on the Provincial Courts, viz., the jurisdiction to grant alimony, and the jurisdiction to grant probate of wills and administration of deceased persons' estates. It appears from the Quebec Act, 14 Geo. III. c. 83, s. 17, that the question of Ecclesiastical Courts was not lost sight of, and power was expressly reserved to create them in the future; but that power was never exercised.

The result is that there is no court in Ontario which has jurisdiction to pronounce a decree of nullity of marriage. Nullity of marriage, of course, differs from divorce. It is pronounced where there never was a lawful marriage; whereas a divorce is the judicial annulment, wholly or partially, of a legal marriage.

The establishment of a matrimonial court does not necessarily involve the granting to the court any power to grant divorces *à vinculo,* although, if such a court were established, it would be the natural repository of such a divorce jurisdiction, if any were granted. But the establishment of a matrimonial court appears to be necessary whether it be granted jurisdiction to grant divorces *à vinculo* or not.

At present, a de facto marriage may have been entered into, which, in law, is null and void; and yet there is no provincial tribunal to declare it null. People within prohibited degrees, or persons physically incompetent, or under duress, may have gone through the form of marriage, but such marriages cannot, at least in most of the Provinces, be legally annulled except by application to Parliament.

With regard to divorce no doubt opinions widely differ. Prior to the Reformation the rule of the Christian Church in the West was that marriage was indissoluble during the lifetime of the parties. The legal definition of Christian marriage is that it is the union of one man and one woman for life to the exclusion of all others; see *Re Bethell, Bethell* v. *Hildyard,* 58 L.T. 64; *Hyde* v. *Hyde,* L.R. 1 P.D. 130. Divorces à mensa et thoro only were allowed, but not divorces à vinculo. These divorces à mensa et thoro were merely a legal separation from

bed and board, and did not entitle either spouse to marry again in the lifetime of the other.

This view of the indissoluble character of marriage was based on two grounds; (1) the express declaration of our Saviour Himself, that they whom God had joined no man should put asunder, and (2) on the sacramental character of the marriage contract, as held by some bodies of Christians.

At the great upheaval of the Reformation, marriage, with every other religious question, came into controversy, and the sacramental character of marriage was contested. Those who professed to base themselves on scripture being the advocates, in this particular, for disregarding the words of scripture and the teaching of Christ Himself, and being foremost advocates for granting divorces for causes even more frivolous than any American legislature has as yet favoured. This lax view regarding matrimony which has come down to us from the Puritans of the 17th century still largely prevails among those who have inherited their religious principles.

The difference of opinion as to the sacramental character of matrimony, if the truth were known, was probably largely due to the fact that neither party to the controversy understood how it came to pass that matrimony had come to be called a "sacrament," or in what the sacrament of matrimony really consisted.

The word "sacrament" as everyone knows is not a scriptural term. None of the ordinances of religion are called "sacraments" in the New Testament. How, then, did it come to pass that the word "sacrament" was applied to matrimony, etc.? The word from which sacrament is derived seems to furnish a very plain and easy solution, *sacramentum* was the Roman soldiers' oath of fidelity, and it is easy to see that in the mutual promises of fidelity which the marriage contract expressly or impliedly involves we have the sacramentum: Now, this promise according to the word of Christ Himself involved a lifelong obligation, and was irrevocable. To violate it was not to violate an ordin-

ary, but a sacred, contract. Hence it was properly called a sacrament.

The indissoluble character of marriage continues to be theoretically the doctrine of both Anglicans and of the Church of Rome at the present time. But although the Romish view of matrimony is theoretically strict, it is practically lax, because it refuses to recognize as religiously valid, any marriage, which has not been solemnized by a priest of that denomination, with the result that any other marriage is regarded by Romanists as mere legalized concubinage and its dissolution not only a lawful but a meritorious act. The Anglican part of the Church, on the other hand regards all marriages between persons having the right to contract matrimony as indissoluble when solemnized before persons authorized by law to solemnize matrimony, irrespective of whether that person be a priest of the Church of Rome, a clergyman of the Church of England, or any Protestant minister, or even an ordinary layman duly authorized to perform the ceremony. These considerations cannot be lost sight of where matrimonial legislation is in question.

But it must be recognized as a fact, as Bishop Gore has recently said, "that the modern State cannot be assumed to be distinctly Christian." It has to legislate for all classes of people and it is bound by the principle of religious tolerance from which it will not depart. We cannot conceal from ourselves that there are those in our midst who do not adopt the view of Christ concerning matrimony, and they do not regard it as an indissoluble bond. The only question is therefore whether they are yet sufficiently numerous to justify the Parliament of Canada in giving effect to their opinions concerning divorce. But, after all, the question now brought prominently before the public by Mr. Johnston's very able paper is whether the present cumbersome, unsatisfactory and unfair procedure for obtaining a divorce should not be superseded.

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

By the Honourable Mr. Justice Riddell, LL.H.D., LL.D.

It is interesting to an Ontario practitioner to consider how the courts in his province have been conducted in the past.

I propose to give an account, incomplete as it must be—of the proceedings in Term of the Court of King's Bench in Upper Canada during the period covered by Term Book No. 9 at Osgoode Hall. This book has been selected almost at random as the preceeding books contain proceedings quite as interesting; but this particular Term book I have recently had occasion to consult to clear up an obscure point of our legal history.

The book covers the time from Easter Term, 5 George IV., April 19th, 1824, to Michaelmas Term, 8 George IV., Nov. 17, 1827. Until the end of Trinity Term, 6 George IV., July 2nd, 1825, the chief justice was William Dummer Powell, the two puisne justices were William Campbell and D'Arcy Boulton. Sometimes all three sat, sometimes only two, and sometimes one. In Michaelmas Term, 6 George IV., Oct. 24th, 1825, Campbell was sworn in as Chief Justice and Levius Peters Sherwood as junior puisne. Mr. Justice Boulton did not sit from Easter Term, 6 George IV., April 19th, 1825, until Michaelmas Term, 7 George IV., Nov. 6th, 1826. He sat during that Term and Hilary Term, 7 George IV., January 1st to 13th, 1827, but does not thereafter appear. He resigned, and Mr. Justice John Walpole Willis was sworn in, Michaelmas Term, 8 George IV., Nov. 5th, 1827; there was no further change during the period of Term Book No. 9.

The clerk of the Crown and Pleas who acted as registrar—from after Oct. 24th, 1824, was Charles Coxwell Small who has been called in the April previous—he is No. 80 on the Law Society's Roll. The clerk of the Crown and Pleas was of no slight importance—on Nov. 8th, 1827, the full court, Campbell, C.J., Sherwood, and Willis, JJ., announced as follows: "The court ordered that as no business could be done on account of

the illness of the clerk of the Crown, the time should be enlarged for four day rules until to-morrow" and then adjourned till the morrow at 10 o'clock on Nov. 9th, "the court being informed by letter from the clerk of the Crown, Mr. Small, that he is too much indisposed to attend the court and requesting Mr. Cawdell may act as his deputy in court. It is ordered that the said Mr. Cawdell* do act in that capacity till the court shall make further order respecting the matter and either approve or disapprove of Mr. Small's appointment of a deputy." As nothing further is heard of the matter, it may be assumed that Mr. Small came back to his post, and that his deputy was in the meantime satisfactory.

Chief Justice Powell was born in Boston, Massachusetts, of an old Welsh family (Ap Howell). He was educated in England and called to the Bar of the Inner Temple. He took the loyalist side and went to Montreal some years before peace was declared in 1783. In that year, he took to London a petition signed by many of the English immigrants against having the French Canadian Civil law imposed upon them as has been done by the Quebec Act, 14 George III. c. 83 (1774). Returning to Canada he was employed by Lord Dorchester, the Governor-General, on several commissions, and was in 1789 appointed sole judge of the Court of Common Pleas which Dorchester had instituted for the District of Hesse. The headquarters of this court were at Detroit which till 1796 was part of Canada. The court also sat at L'Assomption which is now Sandwich, and the proceedings for a great part of the time the court was in existence are still at Osgoode Hall in the King's Bench vault. Powell was also made a member of the Land Board for Hesse, sitting at Detroit.

When in 1794, by 34 George III. c. 2, the Courts of Common Pleas were abolished and a Court of King's Bench was

*This, no doubt, is what is referred to in the index to Taylor's Reports, p. 536, "The court required that the appointment of deputy clerks of the Crown should be sanctioned by the court." Caldwell, ex parte. The decision nowhere appears in the body of the volume—and I have copied the official record, spelling and all.

created, Powell was made a justice of that court. William Osgoode was the first chief justice of Upper Canada, having come out in that capacity shortly after Simcoe, but he never sat in the King's Bench in Term. Powell sat either alone or with Hon. Peter Russell who received a commission more than once for a temporary period, until Elmsley was appointed chief justice in 1796. Allcock was in 1798 appointed a puisne justice, and thenceforward with short intervals the court was composed of a chief justice and two puisnes, until it was merged in the High Court of Justice in 1881. Although the full court was in theory three judges, two or even one of them exercised the powers of the full court. Powell was a diligent judge. Only one instance is known of his being absent from the Bench in Term for any protracted period: that was from July, 1806 till November, 1807, when he was in Spain in the successful attempt to secure the release from a Spanish-American prison of his son who had joined Miranda in his unsuccessful revolutionary incursion into Venezuela.* He was made chief justice in 1816 on the resignation of Chief Justice Scott, and was also appointed Speaker of the Legislative Council.

During the last few years of his judicial life he rather fell out of the good graces of the administration, and when he desired to resign upon a pension, the Executive Council reported against it. Notwithstanding this, he finally was granted a pension for life of £1,000 sterling. He lived the short remainder of his life—nine years—in Toronto, dying there in 1834.

D'Arcy Boulton was an Englishman who came before the beginning of the last century to Upper Canada, arriving in York (Toronto) in 1807. He received a licence to practise in 1803 from the Administrator of the Government and became a member of the Law Society the same year (No. 22 of the Society's Roll). He became Solicitor-General in 1805. In 1810 sailing for England he was taken by a French privateer after being

*In the first Term after his return from Spain he took part with Scott, C.J., in discussing the only action of Scandalum Magnatum ever brought on this side of the Atlantic. The proceedings were taken by Mr. Justice Thorpe against Joseph Ryerson: "Thorpe qui tam. v. Ryerson."

wounded in a gallant resistance. He was kept a prisoner in France till the temporary peace of 1814. On his return to Upper Canada he was made Attorney-General, when John Beverley Robinson (afterwards, C.J.), who has acted as Attorney-General since the death at Queenston Heights of Col. John Macdonell, succeeded Boulton as Solicitor-General. Boulton was made puisne judge in 1818, when Robinson succeeded him as Attorney-General, and Henry John Boulton, his son, became Solicitor-General. Resigning in 1827, he survived for only three years, living all the time in York.

William Campbell was the first of our judges to be knighted. He was a Scotsman who came to this continent as a private soldier in a Highland regiment. He fought during the Revolutionary War, being taken prisoner at the surrender of Cornwallis; at the peace he went to Nova Scotia. Called to the Bar of Nova Scotia, he was in 1811 appointed to the King's Bench in Upper Canada. He became chief justice, as we have seen, in 1825, and resigned in 1829 to be succeeded by John Beverley Robinson. He, on his resignation, received the honour of knighthood.

Levius Peters Sherwood was Canadian born, the son of Mr. Justus Sherwood of Augusta (his name is sometimes given Mr. Justice Sherwood, leading to some confusion with his more celebrated son).

The future judge was called in 1803 (No. 19), became a member and Speaker of the House of Assembly, and an ardent supporter of the Government.* In 1841, he was called to the Legislative Council as Speaker and in 1825, appointed to the King's Bench. He survived till 1850.

John Walpole Willis deserves an article devoted to himself —I therefore say nothing of him at this time.

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*William Lyon MacKenzie speaks thus of him, p. 337 of his "Sketches of Canada and the United States."

"Levius Peters Sherwood was at one and the same time collector of customs at Brockville and at Johnstown; judge of the district court of the two counties; registrar of conveyances for Grenville court and for Carleton county; Surrogate judge, Johnstown district; M.P. for a county, and Speaker of the House of Assembly."

At the time now under consideration, the Law Society did not, as now, simply furnish to the court a certificate of fitness to be sworn in as an officer of the court for each aspirant to the position of attorney. The officers whom we now call solicitors were in the Common Law Courts called attorneys and in the Court of Chancery were called solicitors. Since the Judicature Act of 1881, the name attorney has not been in use. The Court of King's Bench being a common law court, its officers were attorneys.

One desiring to be sworn in and enrolled as an attorney appeared in court in Term with evidence of his having served the prescribed time as a clerk; his papers had to be regular—for example, July 17th, 1824, before Powell, C.J., Campbell, and Boulton, JJ., Mr. John Lyons was proposed by the Solicitor-General to be sworn in as an attorney. Upon producing his articles of clerkship, the certificate of his master appearing insufficient, the court refused to admit him. The Solicitor-General was Henry John Boulton, and it was he who was "his master," yet the court did not accede to the motion: *Ex parte Lyons* (1824), Tay. 171; *Ex parte Radenhurst* (1824), Tay. 138. Next Term, Nov. 13th, before the same court, "Mr. John Lyons, having produced his articles of clerkship to Henry John Boulton, Esquire, for the faithful service of upwards of three years and the additional affidavits from these produced on his last application the court ordered that he be sworn in as an attorney of this Honourable Court." Nov. 7th, 1826, "The treasurer of the Law Society presented A. Wilkinson, Esquire, and John Lyons, Esquire, as being admitted barristers"; and Nov. 18, they were sworn in as barristers accordingly.

Those desiring to be admitted as barristers were, in most instances, presented by the treasurer of the Law Society, and sworn in at once, as is the present practice; but this was not always the case; for example, in Michaelmas Term, 2 Geo. IV., Nov. 7th, 1821 (Præs. Powell, C.J., Campbell, and Boulton, JJ.). "Mr. John Rolph having produced satisfactory evidence of his having been admitted to the English Bar—he took the usual

oath and was admitted a barrister, and attorney of the honourable court." This was the well-known Dr. Rolph; he was admitted to the Law Society on the same evidence and is No. 64 on its roll.

In Michaelmas Term, 2 George IV., Nov. 1821 (Præs. Powell, C.J., Campbell, and Boulton, JJ.), Robert Berrie, Esquire, applied to be admitted to practise as a barrister, under the provision of 43 George III. passed March 5th, 1803, "and having produced proof to their satisfaction of his having been admitted to practice at the court of the sheriff's depute of Lanarkshire held at Glasgow, and also of his character and conduct it is considered by the judges that the said Robert Berrie be admitted to practice in this province as a barrister and the said Robert Berrie took the oaths required and is hereby admitted accordingly." He was also admitted to the Law Society and is No. 65 on the roll. Nothing like these cases occurs, however, during the period of Term Book No. 9.*

While the court was very careful as to whom they would admit as attorneys (or to use the traditional orthography, attornies), no one who had not been admitted was allowed to practise as an attorney on penalty of being attached for contempt.

Barnabas Bidwell, father of the better-known Marshall Spring Bidwell, was charged with practising as an attorney under the name of Daniel Washburn of Kingston, who had been struck off the roll for misconduct. The following are the entries: Easter Term, 8 George IV., April 24th (Præs. Campbell, C.J., and Sherwood, J.), "in the matter of Barnabas Bidwell, on the complaint of John McLean, Esquire, sheriff of the Midland District, motion for a rule to shew cause why an attachement should not issue against the said Barnabas Bidwell for a contempt for acting and practising as an attorney in the name of Daniel Washburn, Esquire, in a certain cause wherein Samuel Brock was plaintiff and John White defendant, on affidavit of John McLean, Esquire, and of the said Samuel

*See In re Macara, 2 U.C.R. 114. Mandamus. In re Lapenotière, 4 U.C.R. 482.

Brock; H. J. Boulton, for plaintiff. Stands for to-morrow; H. J. Boulton files three papers and motions; W. W. Baldwin files two papers"; "April 25th, affidavit put in and filed by R. Baldwin"; May 5th, "Rule granted"; June 28th, "The court withholds giving an opinion on the present application at present, W. W. Baldwin, H. J. Boulton."

June 30th, "Rule discharged, W. W. B., Esq." Nothing is more certain than if Bidwell had been proved to be practising as an attorney, he would have been attached for contempt of court, fined and imprisoned.*

The court exercised strict discipline over its attornies. Many cases are found of motions against such officers. I give some of them. In Easter Term, 8 George IV., May 3rd, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "*In re Sam. Merrill,* one etc., motion for a rule to shew cause why an attachment should not issue against Samuel Merrill one of the attornies of this honourable court for a contempt on matters disclosed on affidavit, John B. Robinson, Attorney-General, granted." June 28th, "Attachment ordered, John B. Robinson, Attorney-General."

In Michaelmas Term, 7 George IV., Nov. 6th, 1826 (Præs. Campbell, C.J., Boulton, and Sherwood, JJ.), "The Solicitor-General handed into court (as public prosecutor) a presentment of the grand jury of the Newcastle district against Marcus Whitehead, Esquire, together with certain affidavits to support the same for having charged, in the course of his profession ex-

*See The King v. Bidwell, Tay. 487. Barnabas Bidwell was administrator of the estate of Washburn. His celebrated son, Marshall Spring Bidwell had been a clerk in Washburn's office. The whole trouble arose from the fact that the elder Bidwell being managing clerk for Washburn, had, as such, given in Washburn's name a direction to sheriff McLean to release a defendant from custody who had been in execution under a ca. sa. The plaintiff, one Brock denied the authority to give this order, and brought an action for an escape against the sheriff. The court held that Washburn had no authority to release the debtor, at least not without receiving payment of the debt; and Brock recovered judgment against the sheriff: Brock v. McLean, Tay. 310, 398. Thereupon McLean took these proceedings, with the object of compelling Bidwell to re-imburse him but, as we have seen, failed.

cessive fees, and also for having charged and received monies under false pretence."

Nov. 18th, "In the matter of certain charges preferred by the grand jury at the last Assizes for the district of Newcastle and by the Solicitor-General laid before the Court of King's Bench against Marcus F. Whitehead and Thomas Ward Esq., the former as clerk and the latter as judge of the district court in the said district of Newcastle—*In re Whitehead.* The Attorney-General moves for a rule to shew cause why an attachment should not issue against the said Thomas Ward and Marcus F. Whitehead respecting the former for having taxed to the latter as attorney and the latter for having charged and received illegal costs in certain cases in the said district court in which John Wilder, Christopher Lightle, Festus Burr, Richard Wright, Ephraim Farren, Joseph Cuthbert Townsend, were parties, J. B. Robinson, Esquire, Attorney-General, granted."

Hilary Term, 7 George IV., Jan. 13th, 1827, same judges present, "Attachment ordered against both defendants" on motion of the Attorney-General. April 30th, "Defendants' answer put in and filed in this cause."

Trinity Term, 8 George IV., June 18th (Præs. Campbell, C.J., and Sherwood, J.), "Judgment of the court that M. F. Whitehead do pay a fine of fifty pounds and remain in custody till paid and that Thomas Ward, Esquire, judge of the district court of the district of Newcastle do pay a fine of five pounds": See *The King* v. *Whitehead and Ward*, Taylor 476.

Hilary Term, 7 George IV., Jan. 13th, 1827, "In the matter of complaint of Francis Beattie against M. F. Whitehead, one of etc., motion for a rule to shew cause why an attachment should not issue against M. F. Whitehead, one of the attornies of this court for exacting unauthorized and exorbitant fees of one Francis Beattie on account of costs alleged to be due him in a cause of the said Francis Beattie against one Kenneth Meriam in the district court of of the district of Newcastle in which

cause the said M. F. Whitehad was attorney for the said Frs. Beattie. J. B. Robinson, Attorney-General, granted."

On the same day, upon a motion of the Attorney-General, the same rule was granted against the same attorney on the complaint of Francis Parmentier, who had been sued in the same court by Adam Henry Meyers and had been represented by Whitehead as attorney. May 3rd, both rules were argued and "stand till next Term for judgment; J. B. Robinson, Esquire."

The same day a rule was granted against Whitehead at the instance of a suitor in the case of Henry Elliott v. John Badcock, in the same district court of the Newcastle district to shew cause why he "should not be fined the sum of three pounds illegally taken by him as an attorney in that cause . . . why an attachment should not issue against him. H. J. Boulton, for complainant."

These seem to have been dropped when Whitehead was punished. No doubt he repaid the costs improperly obtained.

There are several such motions. Sometimes the attorney satisfactorily explains the matter.* Sometimes the whole dispute is referred to arbitration.†

Easter Term, 8 George IV., May 3rd, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "In re F. X. Rocheleau, one of the attornies of this honourable court. Motion for a rule to shew cause why an attachment should not issue against Francois Xavier Rocheleau, one of the attornies of this honourable court, for a contempt on matters disclosed on affidavit; John B. Robinson, Attorney-General, granted." June 28th, "Enlarged rule."

On Nov. 7th, 1826, D. Bethune had obtained a rule against this attorney to shew cause why an attachment should not issue against him for not paying over monies collected by him as attorney for Robert Moore. But this rule, although taken out,

*As in Radcliffe v. Small, Taylor, 308, where the client had instructed the attorney to send the money by return of boat, and the attorney had sent it by a passenger of the boat who did not hand it over. The client was left to his common law remedy.

†As in Carruthers v. John Rolph (the celebrated Dr. Rolph), Taylor 243.

does not seem to have been pressed, probably the attorney paid the amount and costs.

Other officers did not escape, for example sheriffs.

An attachment having been granted against Rapalje, the sheriff of the London district, the following proceedings were had—on April 26th, 1826, a rule was procured by James E. Small in Rex v. Abraham A. Rapalje (sheriff) to George W. Whitehead, one of the coroners of the London district, to return the writ of attachment to him directed against Abraham A. Rapalje, sheriff of the said London district and returnable the first day of this term. On Nov. 10th, 1827, Abraham A. Rapalje, sheriff of the London district "entered into a recognizance with James Fitzgibbon and Enoch Moore as sureties to appear in the court and answer, etc. Michaelmas Term, 8 George IV., Nov. 16th, 1827 (Præs. Campbell, C.J., Sherwood, and Willis, JJ.), "Interrogatories and answers read by Attorney-General. Sentence of the court, "Mr. Rapalje to remain in custody till monev be paid."*

In Trinity Term, 8 George IV., June 30th, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "In the matter of John Spencer, Esquire, sheriff of the district of Newcastle. Motion for a rule to shew cause why an attachment should not issue against John Spencer, Esquire, sheriff of the district of Newcastle, for an abuse of his office in exacting excessive and illegal fees; John B. Robinson, Attorney-General."

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*The full story is that Rapalje had in his hand a writ of fi. fa. He was ordered by the court to return this writ into court with an account of what he had done under the writ—he omitted to do so. Then followed the next step. Michaelmas Term, 5 George IV., Nov. 18th, 1825 (Præs. Campbell, C.J., and Sherwood, J.), "John Secord and Elijah Secord v. Thomas Horner. Motion for an attachment against A. A. Rapalje, sheriff of the London district for not returning the writ of fi. fa. to him directed in this cause pursuant to a rule of the court on motion of Jas. E. Small, Esq., of counsel for the plaintiff. Granted and issued." This writ was, of course, directed to one of the coroners of the district, but the coroner, Mr. Whitehead, did not execute it. It therefore became necessary to move against him. Accordingly on June 30th, 1826, an attachment was issued directed to James Mitchell and ....., Esq., elisors, against George W. Whitehead, one of the coroners of the London district for neglecting to return the writ of attachment issued to him and returnable in Easter Term last. Then, and only then, the sheriff gave himself up and appeared in court.

Nov. 5th, 1827, "on application of Mr. George Boulton on behalf of the sheriff of the Newcastle district, the court, consented that the rule returnable against him this Term should stand over to the first of the next Term." Nothing more is heard of the matter, probably the matter was amicably settled. It is more than likely that the excessive fees were taken under a misunderstanding of the tariff; or it may be that the deputy sheriff was the real offender.

In Easter Term, 8 George IV., May 4th, 1827 (Præs. Campbell, C.J., and Sherwood, J.), "In the matter of Ebenezer Perry, deputy sheriff of Newcastle. Motion for a rule to shew cause why an attachment should not issue against Ebenezer Perry, deputy sheriff of the district of Newcastle, for a contempt in taking illegal and extorsive fees in the following causes: John Nix v. Daniel Hendrick; Jabez Lynde v. John Pickle; Abraham Butterfield v. Thomas Spencer and Israel Ferguson; John Nix v. Benjamin Davidson; Henry Elliott v. John Badcock, and Elijah Burk v. Adam Scott, and James Waldron v. Adam Henry Meyers. H. J. Boulton, rule nisi, granted and issued," June 21st, "Attachment ordered." Michaelmas Term, 8 George IV., Nov. 12th, 1827, "Interrogatories filed by H. J. Boulton. Nov. 14th, "Mr. Perry's answers to the interrogatories sworn to, read and filed in court."

Nov. 15th, "The court ordered that the said Ebenezer Perry should pay a fine of two pounds and to stand committed till paid."

WILLIAM RENWICK RIDDELL.

THE LAW REFORM ACT, 1909—*ONTARIO*.

Now that the first part of this Act has come into force it has become apparent that it is defective in regard to details. Some matters necessary to the smooth working of the Act are left unprovided for, and some things which are provided for are in such a state that it is doubtful what is the real effect of the Act regarding them.

What the Act apparently aims at, is to blend the former Court of Appeal and High Court of Justice into one Court, the Supreme Court of Ontario, which court is to be divided into two Divisions, the Appellate Division, and the High Court Division. But in order to carry out this idea it would seem to be necessary to vest in the amalgamated court all the jurisdiction of the two pre-existing courts, but no such provision is to be found, and on the contrary the former courts are expressly continued under other names.

The Court of Appeal is hereafter to be known as the Appellate Division of the Supreme Court of Ontario and such Division is to be a continuation of the Court of Appeal, s. 5; and the "High Court," by which is probably meant the "High Court of Justice," is hereafter to be known as the "High Court Division of the Supreme Court of Ontario," and is to be a continuation of the "High Court" by which is probably meant the "High Court of Justice."

Thus the Act, though purporting to amalgamate the former courts, virtually leaves them existent, but under different names.

Assuming that the High Court Division is still the High Court of Justice under another name, and that the Appellate Division is the Court of Appeal under another anme, it becomes a matter of some moment to determine what is the exact status of the Second Divisional Court of the Appellate Division. That court is to be composed of judges of the High Court Division, it appears to be intended to exercise co-ordinate jurisdiction with the First Divisional Court of the Appellate Division, but the question will arise: is the second Divisional Court to be regarded as "the final Court of Appeal of the Province?" so that an appeal will lie therefrom to the Supreme Court. In other words does the fact of the Legislature giving to certain judges of the High Court of Justice appellate jurisdiction under the title of the Second Division of the Appellate Division, constitute the tribunal so composed, a final Court of Appeal, within the meaning of the Act relating to appeals to the Supreme Court of Canada? Until this question is affirmatively settled we should think it would hardly be wise to take cases in which a

further appeal might be desirable to the Second Divisional Court.*

If the Second Divisional Court is intended to be constituted a part of the "Court of Appeal" as it formerly existed, there is the difficulty that the judges who are to compose it have not been appointed nor sworn in as judges of that court, but as judges of a court of first instance, viz., the High Court of Justice.

Not only does this matter need to be cleared up, but so does the question of the titles of the various officials of the court whose former titles are not changed by the Act, and they therefore continue to bear titles of a vanished court, or titles which do not accord with the present name of the court.

It is no wonder that ordinary lay people find it difficult to keep track of the titles of judges and officers of the courts when even the Legislature itself is at fault.

Section 8, we notice speaks of the "present Chief Justices of Divisions," whereas, as a matter of fact, there was only one Chief Justice of a Division, viz., the Chief Justice of the Exchequer Division. The other Chief Justices of the King's Bench, and Common Pleas, not being Chief Justices of Divisions, but presidents of Divisions. The Chancellor is "President of the High Court of Justice" but that court or its name has disappeared, and he has not been made President of the High Court Division of the Supreme Court of Ontario, except inferentially on the supposition that the High Court of Justice and the High Court Division of the Supreme Court are identical courts.

THE LAW'S DELAY.

In a recent number of this journal we gave space for an expression of the gratification very properly felt at the prompt vindication of justice in the speedy trial, conviction and sentence of the policeman Becker for the murder of the gambler Rosenthal. In this case there was, with the exception of the difficulty

*Since the above was written we understand the Second Divisional Court has held that it is not a final Court of Appeal.

in finding a jury, no unavoidable delay, and the prosecuting attorney and his assistants are deserving of all praise for the skill and energy displayed in bringing the case to a satisfactory conclusion. It must also be remembered to their credit that in dealing with such a gang of cut-throats as they had to encounter the service was one of considerable danger. But under the American system of criminal procedure it is a far cry from sentence to execution, and though Becker has been tried, convicted and sentenced, his end is not yet. He has money and influential associates, and neither legal skill nor ready cash will be spared to take every advantage of any delay that the law will allow, and many months may, and indeed must, elapse before he can be seated in the fatal chair, which has taken the place of the proverbial gallows.

This trial, and many which have preceded it, are teaching the people of the United States that, in their desire to secure the utmost freedom to their citizens, they have made the authority which in every country is necessary to control the disorderly, protect the peaceful, and punish the criminal, so weak that it often fails to accomplish the object for which it was created.

The machinery of the courts of justice is so clogged with safeguards for persons accused that the wheels can scarcely revolve. At every turn a brake is applied, and time and opportunity given to devise fresh means of obstruction. At the very beginning of the trial difficulties arose. So careful is the law to secure an impartial tribunal that days and weeks are often spent in finding twelve men who can be trusted to well and truly try, and true deliverance make, upon the solemn question of the guilt or innocence of the party on trial, and all through the proceedings questions are raised—technical, philosophic, and sentimental, such as are never heard of in our courts, and each is debated at such length, and with such earnestness, that the minds of the jurors must be completely befogged before the real issue is presented to them. Then, when at last the wearisome business is at an end, and the judge has given his charge, generally at great length and particularity, the jury have given their verdict, and sentence has been pronounced, the law steps in to prevent

undue haste in coming to what would seem the inevitable conclusion. If the death penalty has been awarded, as in the recent trial of the policeman Becker for murder, the passing of the sentence is, as to time, but a form, for, of course, an appeal against it is lodged. For the hearing of this six months are allowed, and for cause even that period may be, and often has been, extended. The reason for this long delay lies in the complexity of the procedure, and the voluminous mass of papers made use of. We quote from the *New York World* as to the forms of procedure:—

"First, the defence condenses the record of the trial. The District-Attorney is served with this condensation and within ten days serves on the defence his amendments to the proposed appeal. Both papers are presented to the trial justice for allowances and disallowances; and the case as thus completed is filed. Within thirty days it must be printed. It is then filed with the Court of Appeals. Two or three months go to the preparation of briefs, five days to the District-Attorney's reply, ten days again for the defence in rebuttal.

"Now, the case goes on the calendar; there is not much delay here, for a capital appeal has preference. Sixteen days' notice of argument is required and some days are necessary for the review court to get at the case. If a new trial is refused, the Court of Appeals sets a time for carrying out the original sentence, usually in about six weeks. It would be possible, therefore, in the case of a murderer who is promptly tried, who appeals and fails to secure a retrial, to reach the exaction of the penalty within a year after the commission of the crime. But such comparative celerity is almost unknown."

After hearing the appeal the court must give judgment without regard to technical errors or exceptions, which do not affect the substantial rights of the parties.

What the work of the Court of Appeal may be, and the time required to dispose of the case before it may be gathered from the fact that Becker's counsel took 4,000 exceptions during the trial, though of these some may be dropped. If the verdict stands, and a new trial is refused it would appear from what is

stated above that a prisoner who has means to carry on the proceedings may be sure of the lapse of a year at least between sentence and execution.

If a new trial is granted the whole business is gone over again, and another twelve months may pass before anything is decided, and during that period many things may happen.

The paper from which we have quoted gives a number of cases to shew how this system of procrastination has worked out in practice. One of which we give as a specimen of how the law can delay the carrying out of its own behests.

"The revolting crime of Albert Wolter was expiated in 676 days. He was arrested at once, indicted in 6 days, tried in 28 days, sentenced in 33 days. The Court of Appeals took but 8 days to deny his final plea and he was then executed in little more than a month. But between came 588 days of delay, which was clearly against public policy. Six months were gained on a plea of 'destitution.' In seeking a retrial the counsel employed dilatory tactics which Judge Bartlett scored as inexcusable."

In contrast to the above, and many similar cases, reference is made to the trial in London of the poisoner, Dr. Crippen, who, including the time spent in pursuing him to New York, and in the proceedings for extradition, etc., was tried and executed four months and five days after the discovery of his crime, his trial having lasted only four days.

As the result of this slow and easy way of dealing with murderers statistics of a very startling character are given, shewing how much greater is the prevalence of the crime of murder where this system prevails, as compared with England, where the crime is as quickly followed by punishment as the claims of justice will permit. Greater London had in 1909 nineteen murders and 27 cases of manslaughter. New York in 1911 could boast of 198 murders and only 13 executions. In many of the large cities of the Union the disproportion was still greater, and the number of executions in inverse ratio to the number of convictions. This prevalence of legal delays is now the subject

of comment in the American press, and is being regarded, as President Taft described it, as a disgrace to their civilization. A remedy will doubtless be found. In the meantime let us beware lest the allowing of appeals in criminal cases be attended with similar results.

"WITHOUT PREJUDICE."

Just as compromise is recognized as the essence of business, so the law has always favoured the attempt by parties to compose their differences without pressing their disputes to an issue in court. And it is with the object of facilitating such a result that the privilege has been granted to negotiations entered into "without prejudice" for the purpose of effecting settlements.

In order to understand the precise scope of the rules upon which it is based, it is important to appreciate the nature and object of the immunity enjoyed by the parties. Unless they were protected in submitting offers to each other, it would be impossible to frame the terms or to carry through anything by way of compromise of litigation. It is clearly most important that the door should not be shut against compromises, which would inevitably be the case if letters written or interviews held without prejudice for the purpose of suggesting methods of settlement were liable to be read subsequently to the prejudice of the writer. Complete freedom must be maintained subject to proper safeguards against abuse.

It will accordingly be observed that the privilege is limited to cases where the parties are really involved in a dispute and are in negotiation with one another for the purpose of agreeing terms of settlement. If these conditions are fulfilled, the protection is absolute, and parties will not be permitted, except by mutual consent, to waive the privilege. A decision to the contrary effect in *Williams* v. *Thomas*, 7 L.T. Rep. 184, was expressly disapproved by the Court of Appeal in the case of *Walker* v. *Wilsher*, 23 Q.B. Div. 335. The extent of the protection may be seen in the case of *Cory* v. *Bretton*, 4 C. & P. 462, where it was

proposed to read a letter from a debtor, written "without prejudice," in order to take the case out of the Statute of Limitations, and it was objected that the creditors had not assented to the stipulation. Chief Justice Tindal declined to admit the letter in evidence, and, with regard to the point as to the creditors' assent, he remarked that if they did not like the letter with the stipulation they might have sent it back. Another instance where the court adopted the same view is to be found in *Re River Steamer Company; Ex parte Mitchell,* 25 L.T. Rep. 319, L. Rep. 6 Ch. 822.

Privileged letters cannot be read subsequently in order to prejudice a party on the question of the costs of the action: *Walker* v. *Wilsher,* supra. The same rule applies whether the privileged negotiations are oral or contained in letters passing between the parties. When the basis of the negotiations is once privileged, the protection covers all subsequent communications. Thus, when an offer has been made "without prejudice," the letter in answer to such offer is privileged, and the protection thus afforded extends to all letters which follow: Cp. *Ex parte Harris; Re Harris,* 32 L.T. Rep. 417. It is not open to either party by his own act to limit the extent of the privilege. Thus, to head a letter in subsequent correspondence with the words "this is not written without prejudice" is, of course, wholly ineffectual to prevent the continuation of the existing privilege. If this were not so, it would be possible to incorporate in such later letters references to previous offers and thus destroy the efficacy of the protection. It must be remembered, however, that if the terms of an offer made "without prejudice" are accepted, there will be a concluded contract which can be enforced by action: *Walker* v. *Wilsher,* supra. Thus, in *Holdsworth* v. *Dimsdale,* 24 L.T. Rep. 360, where a defendant sued on a bill of exchange, in a letter headed "without prejudice" offered to waive the absence of notice of dishonour if the debt was accepted without costs, the plaintiff accepted the offer and discontinued his action. In the new action which he then commenced he was held entitled to rely on the waiver of the notice

of dishonour as being part of a new bargain between the parties.

The essence of the protection conferred is that, if the negotiations carried on by the letters do not result in an agreement, nothing in them is to be taken as an admission. If an agreement does result, the protection is gone. So in the case of *Re Leite; Leite* v. *Ferreira*, 72 L.T. Jour. 97, where letters written "without prejudice" contained an undertaking in terms which were agreed to by the other side and afterwards the parties giving the undertaking wished to introduce a fresh condition, the original undertaking was enforced by Mr. Justice Fry. Parties are thus enabled effectively to conclude agreements for the ending of disputes provided they arrive at a definite settlement of the terms.

It may be important in some cases to shew that negotiations have taken place, as, for instance, with a view to rebut a suggestion of laches, and if for this purpose it is necessary to refer to letters written "without prejudice" this may be done, but only to the extent of establishing the fact that the letters have passed and the negotiations have taken place, the actual terms of the offer and the manner of its reception being, of course, suppressed: Cp. *Walker* v. *Wilsher*, supra, at p. 338, per Lord Justice Bowen. The privilege covering the letters is, therefore, in no way infringed.

The courts have always been careful to prevent the privilege being abused, and have not permitted its illegitimate use as a cloak to cover acts which are wrongful independently of pending negotiations. Where in letters marked "private and confidential" a defendant threatened, while an action was pending, to publish the pleadings with comments derogatory to the plaintiff, he was restrained by the court from committing what would be a contempt of court. Mr. Justice Fry held that no person has any right by so marking his communications to impose upon the recipient, being already at arm's length with him, any condition as to the mode in which they may be used: *Kitcat* v. *Sharp*, 48 L T. Rep. 64.

Another instance of letters which have been held not privi-

leged occurred in the case of *Kurtz and Co.* v. *Spence*, 58 L.T. Rep. 438. These letters contained threats of legal proceedings for infringement of a patent, and the plaintiff was permitted to put them in evidence for the purpose of establishing his right of action as a holder of a patent against a person so threatening under the provisions of s. 32 of the Patents Act, 1883. The mere use of the words "without prejudice" in the letters afforded no protection to the writer in the particular circumstances. The question was again fully considered and dealt with in the case of *Re Daintrey; Ex parte Holt*, 69 L.T. Rep. 257; (1893) 2 Q.B. 116. A debtor wrote to one of his creditors a letter headed "without prejudice," in which he offered to compound the debt owing on certain terms, and at the same time stated that unless these terms were accepted he would suspend payment of his debts. Such a notice to a creditor of an intention to suspend payment was a clear act of bankruptcy, and it was held that it could be proved in the bankruptcy proceedings which were thereupon instituted, the mere placing of the words at the head of the letter affording no protection to the writer. The court defined the conditions upon which the exclusion of privileged communications is based, and laid it down that a notice of an act of bankruptcy could not be given "without prejudice," because the document in question was one which from its character might prejudicially affect the creditor whether or not he accepted the terms offered.

It will thus be seen that the courts are jealous to prevent any abuse of a privilege which has its legitimate uses, but which might involve injustice if not strictly confined to the purpose for which it was instituted.—*Law Times.*

THE LAW OF BIGAMY.

A recent trial at the Old Bailey serves to illustrate the curious anomalies which appear to exist in the law relating to the offence of bigamy. A person charged with bigamy admitted that he had been married; and when his first wife was alive had gone through the ceremony of marriage with another woman, and subsequently, in the belief that his first wife was dead, had gone through the ceremony of marriage with a third woman, the prosecutrix. After a careful summing up upon the law and the facts by the learned judge who presided, the jury found that the prisoner believed his wife to be dead, but knew that the second supposed wife was alive when he went through the ceremony of marriage with the prosecutrix. The learned judge thereupon, rightly, entered a verdict of not guilty. Bigamy is generally classed in the text-books upon criminal law among the offences against public morals. It is curious, from the standpoint of public morality at any rate, that the law does not regard the transaction with the prosecutrix, in the case we are referring to, as being punishable equally with the offence in respect of the valid marriage. The various numerous decisions upon the offence of bigamy all go to prove that it is of the essence of the offence that the first marriage should be a marriage valid according to our law or according to the law of the country where it was celebrated, or, in some cases, according to the law of the place of domicile of the contracting parties.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

CONFLICT OF LAWS—FOREIGN SUBJECT—FOREIGN WILL—ENGLISH DOCUMENT—CONSTRUCTION—JURISDICTION.

In re Bonnefoi, Surrey v. *Perrin* (1912) P. 233. This was an action in the Probate Division. An Englishwoman domiciled in Italy, died leaving a letter, which according to Italian law, was a valid will. She left personalty in Italy and England, the larger part being in England. Her sisters brought the present action for administration, whereupon those claiming under the Italian will commenced proceedings in Italy, and applied to stay the present action, which application was granted by Evans, P.P.D.; but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ.), held that the action ought not to be stayed, because there was no doubt that the Italian law governed, and the only question was as to the meaning of the Italian will, which, being in English, an English court was better qualified to construe it than an Italian.

HEARING IN CAMERA—PUBLICATION BY ONE OF THE PARTIES OF EVIDENCE TAKEN IN CAMERA—CONTEMPT OF COURT—APPEAL —CRIMINAL CAUSE OR MATTER.

Scott v. *Scott* (1912), P. 241. This was an action for nullity of marriage which had been ordered by the court to be heard *in camera*. After the conclusion of the hearing the plaintiff's solicitor, by her instructions, procured copies of the evidence which he sent for the plaintiff's justification to the father and sister of the respondent. An application was then made by the respondent to commit the plaintiff and her solicitor for contempt of court in thus publishing the evidence taken *in camera*. On the return of the motion the petitioner and her solicitor apologised, but were ordered to pay the costs of the motion. From this order they appealed, but the Court of Appeal (Cozens-Hardy, M.R., Williams, Moulton, Farwell, Buckley, and Kennedy, L.JJ.) held that the order to hear the cause *in camera* was made to assist the court in the administration of justice, not to affect the civil rights of the parties, and that the breach of it was criminal in its nature and the order in appeal was a judgment in a criminal cause or matter and therefore not appeal-

able. Williams, and Moulton, L.JJ., dissented and state the grounds of their dissention in very forcible and vigorous judgments. It is unfortunate that the real merits of the case were thus prevented from being discussed, inasmuch as the action of the plaintiff and her solicitor seems to have been, in the circumstances, perfectly justifiable and not in any real sense an improper interference with the due administration of justice.

UNQUALIFIED PERSON ACTING AS SOLICITOR—MONEY IN POSSESSION OF UNQUALIFIED PERSON ACTING AS SOLICITOR—SUMMARY JURIDICTION OVER SOLICITORS—MOTION FOR PAYMENT INTO COURT—ESTOPPEL.

In re Hurst and Middleton (1912) 2 Ch. 520. This was a summary application against a person not a solicitor to compel him to pay money into court which he had obtained possession of in the following circumstances. A debenture holder's action was brought against a limited company in which the property covered by the debentures was sold under an order which directed the purchase money to be paid into court. The purchase money was received by one Jones as agent for Evans, the plaintiff's solicitor. Jones was associated in business with Evans, who paid him for the use of his offices and shared with him the profits of business introduced by him; Jones paying the necessary disbursements. Among the business introduced by Jones was the debenture holder's action. All payments and receipts including the money in question, passed through Jones' banking account, on which Evans had no authority to draw. Proceedings to recover the purchase money from Evans having proved abortive, a summary application was made against Jones to compel him to pay it into court. On the hearing of the motion it was objected that the court had no summary jurisdiction over Jones. Eve, J., held that as he had assumed the privileges of a solicitor, and carried on business as an officer of the court, he was amenable to its summary jurisdiction; but the Court of Appeal (Farwell and Kennedy, L.JJ.), reversed his order, holding that Jones not having obtained possession of the money in question by representing himself to be a solicitor, he was not liable to the summary jurisdiction; that a general acting as a solicitor was not sufficient to found jurisdiction. *In re Hulm v. Lewis* (1892), 2 Q.B. 261, was distinguished, because there the party had obtained the money in question by representing himself to be a solicitor; as to whether that case was correctly decided the court seems to indicate some doubt.

DEBT—RELEASE — DEDUCTION OF DEBT FROM LEGACY—ENTRIES IN TESTATOR'S LEDGER—APPOINTMENT OF DEBTOR AS EXECUTOR.

In re Pink, Pink v. *Pink* (1912) 2 Ch. 528. This was an appeal from the decision of Eve, J. (1912), 2 Ch. 498 (noted ante vol. 48, p. 301). The facts were that a testator during his lifetime advanced his son-in-law Moore £9,800. He subsequently, about 1907, entered in his ledger that £5,000 had been given off the debt for an object arranged with Moore's wife, and there was also a further entry, in June, 1909: "This debt is absolutely cancelled from this date, viz., £4,800 and interest. Edward Pink." By his will made in March, 1908, the testator appointed Moore to be one of his executors and settled a sum of £20,000 and one fourth of his residue upon Moore's wife and children and directed that if Moore's wife should die within seven years of his (the testator's) death any sum due from Moore should be absolutely extinguished and that any loss sustained by the indebtedness of Moore should be deducted from the £20,000 legacy. Eve, J., held that, notwithstanding the entries in the ledger there was not sufficient evidence of the testator's intention to make a gift and even if there were such intention, or an imperfect gift, it was not perfected by making Moore an executor, consequently he held that the whole £9,800 was still due. The Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Kennedy, L.JJ.), agreed with Eve, J., that as to the £5,000 there had been an imperfect gift which had not been carried out, and as to that there was not a valid release, and therefore that sum was still due; but as to the £4,800, they held that the entry in the ledger, coupled with the appointment of Moore as executor, was a good release in equity of that part of the debt.

WILL — CONSTRUCTION — GIFT TO CLASS AFTER LIFE ESTATE — GIFT OVER TO "SURVIVORS" — SURVIVORSHIP REFERRING TO PERIOD OF DISTRIBUTION.

In re Poultney, Poultney v. *Poultney* (1912) 2 Ch. 541. This was an appeal from Joyce, J. (1912), 1 Ch. 245, on the construction of a will whereby the testator devised and bequeathed his real and personal estate in trust for his wife for life "and from and after her decease upon trust to divide my trust estate equally between my children" (naming eight). The last clause of the will further provided, "I direct that in case of the death of one or more of my children that their equal share or shares are to be equally divided between the survivors." The eight

children survived the testator, one of them died in the widow's lifetime leaving children, and the question to be decided was whether or not these children were entitled to their deceased parent's share. Joyce, J., decided in their favour, holding that the gift over on death of any one of the testator's children meant death in the lifetime of the testator. The Court of Appeal (Cozens-Hardy, M.R. and Farwell, and Kennedy, L.JJ.), however, reversed his decision, being of the opinion that the gift was a gift to a class ascertainable at the death of the testator and that it would therefore be impossible to give any effect to the gift over except by holding that the death therein referred to is a death of any of the children before the period of distribution; the children of the deceased child were, therefore, declared to have no interest in their deceased parent's share.

CHARTER PARTY—LUMP SUM FOR FREIGHT—LOSS OF SHIP BY EXCEPTED PERIL—DELIVERY OF PART OF CARGO—RIGHT OF SHIPOWNER TO FREIGHT.

Harrowing Steamship Co. v. *Thomas* (1912) 3 K.B. 321. This was an action to recover a lump sum agreed to be paid for freight. By the charter-party the plaintiffs chartered their ship to the defendants to load a cargo of timber and carry it to a named port for a specified lump sum, which was payable on right delivery of the cargo. The charter party contained the usual exception of certain perils. The ship arrived with cargo on board outside the port of discharge, when, owing to heavy weather, she was driven ashore and became a total loss. Part of the cargo was washed ashore, collected and deposited on the dock premises, the rest was lost, the loss being due to one of the excepted perils. In these circumstances the plaintiff claimed to recover the full amount of freight and it was held by Pickford, J., that they were entitled to do so, as they had delivered so much of the cargo as they were not excused by the excepted perils from not delivering, and had thus performed their contract, notwithstanding that the ship had not completed her voyage and the delivery of the part of the cargo had been made otherwise than stipulated for.

CRIMINAL LAW—INDECENT ASSAULT ON GIRL UNDER THIRTEEN—ABSENCE OF AVERMENT OF AGE—INDICTMENT.

Rex v. *Stephenson* (1912) 3 K.B. 341. This was a prosecution for an indecent assault on a girl, who was under thirteen years of age. The indictment contained no averment as to the

age of the girl. The defendant was found guilty, and appealed on the ground of the omission in the indictment of any averment as to the age. The Court of Criminal Appeal (Darling, Phillimore, and Hamilton, JJ.), held that though the omission deprives the prosecution of the benefit of certain statutory presumptions, it does not render the indictment bad, inasmuch as the Criminal Law Amendment Act, 1880, s. 2, which deprives the defendant of the defence of consent where the girl assaulted is under 13, does not thereby create any new offence.

EXTRADITION—HABEAS CORPUS—SECOND ARREST—"TRIAL AND DISCHARGE"—OBTAINING MONEY BY FALSE PRETENCES—CHEATING AT CARDS—EXTRADITION TREATY WITH GERMANY, 1872, ARTS. 2, 4, 15—HABEAS CORPUS ACT (31 CAN. 2, C. 2), S. 6.

Rex v. *Governor of Brixton Prison* (1912) 3 K.B. 424. In this case a German subject had been arrested in India for the purpose of being extradited, on the charge of having obtained money under false pretences; an order for his committal for extradition had been made but, on the prisoner's application, it had been declared to be invalid, and he was ordered to be set at liberty, on the ground that the committing magistrate had refused him an opportunity of adducing evidence in his defence. The prisoner subsequently went to England, where he was again arrested for extradition on the identical charge on which he had been arrested in India and on identical evidence. On the prisoner's behalf it was contended that he could not be again charged with the same offence as that is contrary to the Habeas Corpus Act (1679), s. 6. The magistrate committed him for extradition, and the court (Lord Alverstone, C.J., Darling, and Phillimore, JJ.), held that the proceedings in India did not constitute a trial and discharge of the prisoner within the Habeas Corpus Act, s. 6. The evidence disclosed the commission of an act which, if committed in England, would be a violation of the Gaming Act, 1845, s. 7, and the court held that it constituted evidence upon which the prisoner could properly be charged with obtaining money and goods by false pretences, and that as that crime was within the extradition treaty with Germany an order for his extradition to Germany could be made.

INSURANCE—FLOATING DOCK — "SEAWORTHINESS ADMITTED" — NON-DISCLOSURE OF MATERIAL FACT.

Cantiere Meccanico Brindisina v. *Janson* (1912), 3 K.B. 452. This was an action on a policy of marine insurance, the subject

of the insurance being a floating dock. The policy contained the words "seaworthiness admitted" and the question to be decided was whether or not the policy was void for non-disclosure by the insured of a "material fact," the fact being that the dock had not been specially strengthened for a vayoge. It was not in fact so strengthened, the insurers honestly believing that such strengthening was unnecessary and that it might be safely towed to its destination without it. But as the event proved, the dock did require strengthening and for want of it, was lost on the voyage. Scrutton, J., who tried the case, held that, inasmuch as the Marine Insurance Act, s. 18(3) provides, "In the absence of inquiry, the following circumstances need not be disclosed . . . (*d*) any circumstance which it is superfluous to disclose by reason of any express or implied warranty," that as the fact of seaworthiness was admitted by the insurers, it was unnecessary for the insured to volunteer any information as to whether or not the dock had been strengthened, but that the insurers, on being asked for that warranty were put upon inquiry as to the actual construction of the subject-matter of the proposed insurance, and with this the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.), agreed.

CRIMINAL LAW—OBTAINING MONEY BY FALSE PRETENCES—THREE CARD TRICK—GAMING ACT, 1845 (8-9 VICT. C. 109), S. 17—(CR. CODE, SS. 404, 405, 442).

The King v. *Governor of Brixton Prison* (1912) 3 K.B. 568. In this case the prisoners, two confederates engaged in what is known as the three card trick, a game in which a player having shewn three cards places them face downwards on a table, in such a way as to confuse the eye of the opposite party as to their relative positions, and the opposite player has then to indicate the position of a particular card. The prisoners pretended to be strangers and one of them was to point out the particular card and win with the view of inducing the prosecutor to join in the game. The Divisional Court (Lord Alverstone, C.J., and Channell, and Avory, JJ.), held that this was not "a fraud or unlawful device or ill practice in playing at or with cards" within the meaning of the Gaming Act (8-9 Vict. c. 109), s. 17, (see Cr. Code, s. 442), and therefore would not warrant the conviction of the prisoners for obtaining money by false pretences. The words of the Code, it may be noticed, are more general and include all cheating at any game, and see Cr. Code, ss. 404, 405.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Riddell, J.] [Nov. 13, 1912.

KELLY *v.* NEPIGON CONSTRUCTION CO.

Evidence — Written contract—Parol evidence.

Though terms cannot be imported into a written contract to vary it, evidence of circumstances surrounding the making of the contract or contemporaneous with its performance in whole or in part, may be taken into consideration in determining the amount of damages for breach of the contract.

H. Cassels, K.C., for defendants. *Glyn Osler*, for plaintiffs.

Falconbridge, C.J.K.B., Britton, and Sutherland, JJ.] [Nov. 25, 1912.

RICE *v.* SOCKETT.

Evidence—Expert witnesses, who are.

An "expert" is one who, by experience, has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation.

Potter v. *Campbell*, 16 U.C.R. 109, and *State* v. *Davis*, 33 S.E. 449, 55 S.C. 339, referred to.

R. L. McKinnon, for the plaintiff. *C. L. Dunbar*, for the defendant.

Middleton, J.] RE HUNTER. [Dec. 11, 1912.

Execution—Mode and sufficiency of levy—Seizure of cash—Lien—Trustee Act.

Held, 1. Where an execution creditor duly placed his execution in the hands of the sheriff, who instead of proceeding re-

gularly to sell under the execution the effects of a liquor business belonging to the execution debtor, placed his bailiff in possession of the business itself with directions to take over the daily receipts thereof as a going concern, and where such receipts were actually turned over by the cashier every day to the sheriff, the legal construction of the daily taking over of the money by the sheriff is that each such taking over was a levy thereon under the execution.

2. Where the sheriff seizes, under an execution, certain moneys belonging to the execution debtor, the execution creditor thereby acquires a lien upon the moneys so received, and such lien is protected on the execution debtor subsequently dying insolvent, and the administratrix of his estate is not entitled to delivery up of the moneys so seized for distribution *pari passu* under sec. 52 Trustee Act (Ont.), the saving clause of which section declares, in effect, that the statutory direction for distribution *pari passu* shall not prejudice "any lien existing in the lifetime of the debtor on any of his real or personal property." Trustee Act, 1 Geo. V. (Ont.) ch. 26, sec. 52, construed.

W. R. Smyth, K.C., for the Dominion Brewery. *H. E. Rose*, K.C., for the administratrix.

Province of Nova Scotia.

SUPREME COURT.

[Dec. 14, 1912.

McDONALD *v.* THE CITY OF SYDNEY.

Evidence—Presumption as to negligence of municipal corporation—Unguarded excavation in highway—Absence of direct evidence.

In the absence of direct evidence to shew that the deceased walked into the unprotected portion of an excavation in the street, which was being made by the municipal corporation and which was left with a partial protection only so that as to the remainder it constituted a dangerous trap, an inference to that effect may be drawn from the position in which his body was found and from the fact that deceased had left his house

in a hurry to catch a car and that the trench was on his direct route to do so.

F. McDonald, K.C., for appeal. *H. Mellish*, K.C., *contra.*

Full Court.] [Dec. 14, 1912.

THE KING *v.* GRAVES ET AL. (No. 1).

Criminal law—Murder—Indirect cause of death—Existence of malice or ill-will—Instructions to jury—Refusal of trial judge to reserve case—Appeal allowed.

The prisoners, while in a partly intoxicated condition invaded the lawn in front of deceased's house and used profane and abusive language acting in a disorderly manner. Deceased requested them several times to leave and on their refusal to do so produced a loaded gun and said he would give them one more chance to go or he would fire. The prisoners thereupon made a rush at deceased who reversed the gun and struck one of them a blow on the head with the butt of the gun, which caused the gun to be discharged, inflicting a severe wound upon deceased, which, in connection with subsequent ill-usage on the part of the prisoners, produced a condition of shock resulting in his death. The jury found the prisoners guilty of murder. A reserved case was applied for and refused.

Held (by the majority of the court), allowing defendants' appeal.

1. That the prisoners would not be responsible for the discharge of the gun in the hands of deceased unless he was induced by fear to handle it as he did, and that the existence or non-existence of such fear was an essential point for submission to the jury.

2. That the prisoners were entitled to have submitted the question whether, at the time they did any act which resulted in deceased producing the gun, they, as reasonable men, contemplated that death or grievous bodily harm was likely to result.

3. That the injury caused by the gunshot wound should have been distinguished from those caused by the subsequent ill usage.

4. That the prisoners were entitled to have submitted the question whether the production of the gun by deceased constituted provocation, and, in that connection, the intoxication

of the prisoners as rendering them more likely to give way to passion.

5. That the use of the words "malice or ill-will" throughout the charge, in relation to the reason which led the prisoners to act as they did, was prejudicial to the prisoners, being calculated to give the impression to the jury that any grudge which the prisoners bore to the deceased was equivalent to "malice" which would make the crime murder rather than manslaughter.

Roscoe, K.C., for the prisoners. *Jenks*, K.C., Deputy Attorney-General, and *Wickwire*, K.C., for the Crown.

Full Court.] [Dec. 20, 1912.

BALL *v.* SYDNEY AND LOUISBURG RY. CO.

Railway—Interference with access to spring—Rights of licensee.

Defendant company in constructing their line of railway and fencing in their right-of-way, which they had a statutory right to do, interfered with the plaintiff's access to a spring on land of the Intercolonial Railway which he was permitted to use as a mere licensee.

Held, that no damages were recoverable for such interference.

Mellish, K.C., for appellant. *J. P. Ralston*, and *C. McKenzie*, *contra*.

Full Court.] DOREY *v.* DOREY. [Dec. 20, 1912.

Alimony—Special jurisdiction conferred on Supreme Court—Not extended beyond terms of statute—Procedure of divorce court—Not applicable to Supreme Court.

Chapter 64 of the Acts of the Province of Nova Scotia as amended by c. 35 of the Acts of 1904, conferring upon the Supreme Court the right to grant alimony in certain cases and upon the happening of certain circumstances cannot be extended to the granting of alimony *pendente lite*, the jurisdiction conferred being a statutory one and that power not being specifically mentioned. The provisions and procedure of the Divorce Court are not applicable to the Supreme Court.

Roscoe, K.C., and *Russell*, for plaintiff, applicant. *Mellish*, K.C., *contra*.

Full Court.] INGRAHAM *v.* MCKAY. [Dec. 20, 1912.

Landlord and tenant—Sale of tenant's goods under execution—Purchase by landlord—Right of off-set claim for rent—Consent to sale.

Where the goods of a tenant are sold under execution the sheriff, in order to give a good title must first apply the proceeds in satisfaction of the landlord's claim for rent.

Where the sale, with the assent of the landlord, is held upon the demised premises, the landlord himself becoming the purchaser, he is entitled, notwithstanding such assent, to off-set his claim for rent against the claim for the purchase price of the goods, and is not driven to an action on the case against the sheriff. *Green* v. *Austin*, 3 Camp. 258, where the sheriff sold tortiously, distinguished.

J. L. Ralston, for appellant. *Mellish*, K.C., for respondent.

Province of Saskatchewan.

SUPREME COURT.

Newlands, J.] PIGEON *v.* PRESTON. [Dec. 27, 1912.

Landlord and tenant—Breach of covenant not to assign—Remedy for—Notice to quit—Re-entry—Waiver.

Held, 1. If a lease contains a covenant not to assign the lease without the lessor's consent (and that in such event the lessor could re-enter) and such covenant is violated by the lessee, the proper remedy for the lessor is to enter and terminate the lease; and notice to quit at a future date and a distraint made for the rent cannot be said to be evidence of a re-entry, as the lessee was thus recognised as a tenant by the lessor.

2. Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other rent, and

makes no re-entry, the breach of the covenant not to assign is waived.

Woodfall on Landlord and Tenant, 15th ed., 337, referred to.

J. Munro, for plaintiffs. *H. V. Bigelow*, for defendant. *E. M. Bill*, K.C., for Starland, Limited.

Province of British Columbia

COURT OF APPEAL.

Full Court.] [Nov. 5, 1912.

POWELL v. CITY OF VANCOUVER.

Trusts—Resulting trusts—Conveyance of land as city hall site —Agreement to "maintain" city hall there.

Where the owner of several parcels of land conveys certain of them to a city corporation under a stipulation that the grantee shall "maintain," on the site so granted, its city hall, and where the deed of conveyance makes no provision that the city hall shall be maintained there "for all time" or to any such effect, and where it may reasonably be inferred that the grantor in executing the deed contemplated that a city hall so located near his remaining lots for a limited time would meet his purposes by enhancing the value of his adjacent property, there is no resulting trust in favour of the grantor, in the event of the grantee (owing to rapid city expansion) building a new city hall on a different site, approved by the ratepayers of the city.

Smith v. *Cooke*, [1891] A.C. 297, followed.

Bodwell, K.C., and *Mayers*, for plaintiff. *W. A. Macdonald*, K.C., for respondent.

COUNTY COURT, VICTORIA.

Lampman Co.J.] [Dec. 28, 1912.

B.N.A. AGENCY *v.* FISH ISLAND SYNDICATE.

Insolvent—When debtor to be deemed insolvent.

Held, that the mere fact that a debtor has difficulty in raising money, and allows judgments to go against him, does not in itself warrant his being declared an insolvent, unless his assets are insufficient to cover his liabilities. *Warnock* v. *Kloepfer* (1887), 14 Ont. 288, affirmed 18 S.C.R. 701, distinguished.

H. B. Robertson, for plaintiffs. *Alexis Martin*, for defendants.

Book Reviews.

A Study of the Law of Mortgages. By CHARLES H. S. STEVENSON. Second edition, revised. London: Effingham Wilson, 54 Threadneedle Street. 1912.

This book of 208 pages was originally prepared for students of the law, the author being an expert in all matters connected with the preparation of students of law degrees and solicitors' final examinations, etc. It is at the same time a handy book for practitioners, giving an excellent sketch of questions ordinarily arising on the subject of mortgages. We commend it to students as well as to practitioners who desire a short summary on this most important and practical subject.

The New Competition. By ARTHUR JEROME EDDY, author of The Law of Combinations, etc. D. Appleton & Co. London and New York. 1912.

This, as its name would indicate is more theoretical than practical. It is an examination of the conditions underlying the radical change which is taking place in the commercial and industrial world, a change from the competitive to a co-operative basis. The conclusions are based upon the operations of a number of Open Price Associations, which claim to have accomplished results which were once considered visionary and unattainable.

Bench and Bar.

ONTARIO BAR ASSOCIATION.

There was a large attendance of members at Osgoode Hall, Toronto, at the annual meeting of this Association on December 27th, 1912.

The president, W. C. Mikel, K.C., having delivered his annual address, a paper was read by Mr. James Bicknell, K.C., on "Bankruptcy law," reviewing the subject from a historical point of view, then dealing with the present condition of the Insolvency laws, and concluding with some valuable suggestions for its improvement. We shall, as soon as space permits, publish this paper. The reading of it was followed by an interest-

ing discussion in connection with this matter, a number of members taking part. It was suggested that the best way to bring about action on the matter would be to draw the attention of Boards of Trade and other commercial bodies to the subject. In connection with this subject the advisability of assimulating, as far as possible, our laws to those of Great Britain was discussed, and a committee was appointed to take action towards the promotion of insolvency legislation.

On the same day, Mr. E. F. B. Johnston, K.C., read his paper on the subject of divorce which has already appeared in this journal (page 1). As might have been expected an animated discussion followed the reading of this paper, various views being advocated; some thinking that there should be no divorce law whatever, but others taking the ground that as there was a divorce law in existence, the duty of the hour was as far as possible to improve it.

Reports were also read upon the subjects of legislation and law reform, dealing with the question of fees and tariffs, consolidation of the rules, execution against goods with reference to shares in a company, the right of action for breach of promise of marriage, etc.

Towards the close of the meeting a very important suggestion was made to the effect that the Bar should have some voice in appointments to the Bench. The present plan of making appointments, too often the result of political exigencies, is unfair to the Bar, lowers the Bench, and is injurious to the public. This matter was referred to the council for further discussion.

It will be remembered that a Dominion Bar Association was formed some years ago, but, owing to practical difficulties in its working, it died a natural death. The subject was again brought up at this meeting by a motion erferring its consideration to the council, and suggesting correspondence with Bar associations in other provinces to obtain their views on the subject.

The question of the advisability of appointing a committee to take up the question of the uniformity of laws in section 91 of the B.N.A. Act was also referred to the council.

The following gentlemen were appointed to office:—Honorary President, Sir Alan Aylesworth; President, M. H. Ludwig, K.C.; Vice-Presidents, F. M. Field, K.C., W. J. McWhinney, K.C., and George C. Campbell; Recording Secretary, C. A. Moss, K.C.; Corresponding Secretary, R. J. Maclennan; Treas-

urer, R. McLean Macdonnell, K.C.; Historian and Archivist, Col. Fenton, K.C.

We wish this association every success. As we have often said the profession does not wield, either for its own protection and advancement or for the good of the country, the influence it should. To develop and strengthen this influence these associations should be more in evidence and those who spend time and labour upon them should be encouraged and helped by their brethren.

HAMILTON LAW ASSOCIATION.

TRUSTEES' THIRTY-THIRD ANNUAL REPORT.

The membership of the Association at the date of the last annual report was 74, and the present membership is 78.

The number of bound volumes in the library, exclusive of sessional papers and Government reports, is 4,982, of which 125 volumes have been added during the year.

The Trustees, to the extent of the funds at their disposal, have kept the library supplied with all the latest appropriate legal publications, and the library is kept insured for the sum of $8,800.

The Trustees report with regret the resignation of Miss Counsell, she having filled the office of librarian for many years, with unfailing devotion, great knowledge and skill, but are gratified also to report the appointment of Miss M. E. Mackay as librarian, who has occupied the position now for about a year to the entire satisfaction of the Trustees, and the profession generally.

The Trustees report with regret the deaths of Mr. Charles Lemon and Mr. P. D. Crerar, K.C., the former of whom was a member of this Board and treasurer for many years, and the latter was a distinguished member of the profession, and has occupied the position of Trustee of this Association..

The officers and Trustees elected at annual meeting, Jan. 14, 1913, were: President, S. F. Lazier, K.C.; Vice-President, Wm. Bell, K.C.; Treasurer, W. A. Logie; Secretary, W. T. Evans; Trustees, Geo. Lynch-Stanton, K.C., S. F. Washington, K.C., T. C. Haslett, K.C., E. D. Cahill, K.C., Geo. S. Kerr, K.C.

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THE ADVISABILITY OF ESTABLISHING A BANKRUPTCY COURT IN CANADA.

ADDRESS DELIVERED BEFORE THE ONTARIO BAR ASSOCIATION BY JAMES BICKNELL, K.C.

I. *History of Bankruptcy Laws.*
II. *Present Laws.*
III. *The Causes of Failures of these Laws.*
IV. *Causes of the Repeal of Bankruptcy Legislation in Canada.*
V. *Debates of* 1879 *and* 1889.
VI. *Objections urged in Parliament.*
VII. *Rural Opposition and the Predominance of Quebec.*
VIII. *Is a Bankruptcy Law Vicious?*
IX. *Comparison of Failures in Canada with those in England and the United States.*
X. *English Act of* 1883.
XI. *Proposed Remedies.*

History of Bankruptcy Laws.

The principle embodied in the want of bankruptcy legislation in Canada is, historically considered, that of slavery. In the most primitive stage of society, indeed, the remedy, if there was any, was probably that of private vengeance. In the next stage we have the condition of things which may be described as private vengeance regulated by the State—the manus injectio of the Romans, whereby the creditor was permitted privately to imprison the debtor and even to kill him. In the next stage we have public imprisonment of the debtor. The debtor was restrained of his liberty, that is, he was restrained as to locality and also as to his liberty to deal with his fellowmen. Later still, in the next stage, the restraint as to locality was removed, but the restraint as to the debtor's dealings with others was, in effect,

retained. Imprisonment for debt is abolished, but, no discharge being granted, the disability as to dealing with others persists. In the last and final stage of development personal restraint entirely disappears, and the honest, but unfortunate, debtor is not only not imprisoned, but is left free to engage unhindered in the activities for which he may have any special skill and aptitude to the benefit of himself, his family, and the State.

A glance at the pages of history is sufficient to verify the evolutionary process here briefly sketched. In all primitive communities of which we have historical record, the rule was that a man must pay his debts in full, and if he could not pay with his property he should answer with the liberty not only of himself, but of his family. The Old Testament contains the story of a woman who sought the help of Elisha, saying, "thy servant my husband is dead and the creditor is come to take unto him my two children to be bondmen": 2 Kings: 4, 1.

Sir Henry Main said: "Nothing strikes the scholar and jurist more than the severity of ancient systems of law towards the debtor and the extravagant power lodged in the creditor." It brought many early states to the brink of ruin. In Athens a revolution was only averted by the abolition of enslavement for debt. In Rome in the ancient law of the twelve tables every execution was personal and resulted in the bondage of the debtor and a right to the credtior to sell him into slavery or even to kill him. If several creditors had claims upon one and the same debtor the law allowed them to cut the debtor into pieces and divide his body between them. The creditor's right to sell his debtor was abolished in 313 B.C.; nevertheless, imprisonment continued to be the principal method of execution. When the person of the debtor passed into the power of the creditor the same fate befell his whole estate. It was not until the time of Julius Cæsar that a debtor became entitled to immunity from imprisonment on formally giving up everything to his creditors, cessio bonorum. This cessio bonorum marks the commencement of one of the true principles of bankruptcy.

The earliest English statute on the subject of bankruptcy

was passed in 1542. Then, as now, it was found necessary to enact laws for protection against fraudulent traders. The next Act was passed in 1570 and applied only to traders, but provided penalties for the non-disclosure of assets. Neither of these Acts granted any relief to the debtor in the way of a discharge of liability, and although the law expressed in those Acts was modified by new statutes from time to time it was not until 1706 that the principle of granting a discharge to the debtor was introduced. The Act of 1706 provided that a debtor might with the consent of a specified majority of his creditors obtain from the Commissioners, who had the conduct of the bankruptcy proceedings, a certificate which when confirmed by the Lord Chancellor discharged his person and whatever property he might subsequently acquire from all debts which he owed at the time of his bankruptcy. Until 1831 the jurisdiction over bankruptcy estates was exercised either directly by the Lord Chancellor or by Commissioners appointed by him. In that year a Bankruptcy Court was established in England and continued until the jurisdiction was in 1883 tranferred to the High Court and certain County Courts.

In Scotland, where a most simple and practical system of bankruptcy is now in operation, all insolvents were at one time called dyvours and were regarded as fraudulent debtors. In the beginning of the seventeenth century the unfortunate dyvour was clad in party-colored garment, one-half yellow and the other brown, and in this attire was exposed at intervals upon the public pillory. Although this practice long ago fell into disuse it was not abolished by law until 1836.

When the laws of England were introduced into Upper Canada in 1792, the laws respecting bankrupts were excepted, the Statute 32 George III., c. 1, s. 6, enacting: "Provided always and be it enacted by the authority aforesaid that nothing in this Act contained shall introduce any of the laws of England respecting bankrupts." After the union of Upper and Lower Canada, and in 1843, a Bankruptcy Act was enacted which granted a discharge to the debtor from all debts due by him at the date of

the commission and from all claims provable under the commission. This Act was by its terms to continue in force for only two years, but by subsequent enactments passed annually it was continued in force until 1849. The Act applied only to traders and the term "trader" was very strictly defined. In 1844 an Act for the relief of non-traders was passed by which such persons were protected from arrest under civil process. In 1864 a new Insolvent Act was passed which applied in Lower Canada to all persons. This Act was repealed in 1869 and the Insolvent Act of 1869, which applied to traders only, was substituted. The Act of 1869 was by its terms limited to four years, but in 1874 it was continued until the following year, and in 1875 a permanent Act was passed applicable to traders only, and this Act was repealed on the 1st of April, 1880.

In New Brunswick, prior to Confederation, there was no bankruptcy or insolvency law, nor any provision for the distribution of a person's estate other than by ordinary process and there was no law against preferences.

In Nova Scotia a remedial law intended to supplement and mitigate the law of imprisonment for debt was in force before Confederation, and in British Columbia and Vancouver Island the English bankruptcy law of 1849 was in force until those provinces became part of the Dominion.

Present Laws.

In Ontario and the Western provinces very strict laws are now in force prohibiting unjust preferences of one creditor over another. There are also laws abolishing priority between execution creditors. Assignments for the benefit of creditors providing for a ratable distribution of an insolvent debtor's property among his creditors without preference or priority (except claims given by law or statute a preference such as wages) are valid and for certain purposes the assignee is the representative of the creditors. These Acts also contain provisions for the examination of the debtor and for the contestation of creditors' claims. Under these Acts the assignee is in the first place

selected by the debtor, but may be removed and a new assignee appointed upon a vote of the creditors. The creditors are largely at the mercy of the assignee, both as to the administration of the estate, the expenses connected therewith, the scrutiny of claims, the conduct of proceedings for the contestation of securities and the examination of the debtor. In many cases no doubt the creditors prefer to avoid the loss of time and expense which would be involved in scrutinizing the affairs of the estate and are content to take whatever dividend may become payable and to continue to hold their debtor responsible for the unpaid balance of their claims. Unless a creditor wishes to be unduly harsh he omits to obtain judgment for the amount remaining due to him and consequently in due time his claim is barred by the Statutes of Limitation and the debtor becomes free from enforceable liability except to those creditors who have taken the precaution to obtain judgment against him.

The Causes of Failure of Bankruptcy Laws.

It will be seen by reference to the many Bankruptcy Acts which have been passed both in England, the United States and in Canada that bankruptcy legislation has apparently been a series of experiments. This has been due to various causes. The principle of every Bankruptcy Act since the beginning of the eighteenth century has been the same. The difficulty has been in its administration. Some of these difficulties are:—

1. The manufacture of fraudulent claims.
2. The rapacity of trustees.
3. The expense attendant upon the administration of an estate under the official supervision of a Court.
4. The absence of control by creditors.
5. The facility of obtaining the approval of a deed of composition by creditors constituting the requisite majority.
6. The absence of public examination of the debtor.
7. The want of sufficient penalties for dishonest or reckless conduct or for violations of the principles of commercial morality.

Causes of the Repeal of Bankruptcy Legislation in Canada.

The repeal by Parliament in 1880 of the Insolvent Act of 1875 was probably due to an aggregation of evils rather than to any specific cause. Under the Act of 1875 there was no single Bankruptcy Court. The Act was administered in Quebec by the Superior Court, in Manitoba by the Court of Queen's Bench, in Ontario, British Columbia and Prince Edward Island by the County Courts and in Nova Scotia by the Court of Probate, until such time as County Courts should be established in that province. There was no examination of the debtor in open court. True, a debtor was liable to be examined under oath before the assignee and was bound to attest his statements of liabilities and assets under oath. The administration of the estates was committed to a privileged class of persons called official assignees who were appointees under the party system of Government. No effective audit of the accounts of these assignees was provided for and the security required to be given by them for the proper administration of estates committed to their care was nominal. The debtor by obtaining the execution by a majority in number and three-fourths in value of his creditors having proved claims of $100 and upwards could obtain his discharge unless some dissenting creditor chose to intervene and oppose confirmation of the composition upon grounds enumerated in the statutes. Moreover, at the time that the Canadian Parliament dealt with the matter in Canada an agitation was on foot in England to repeal the bankruptcy law of that country. As the dissatisfaction existing in England with the working of the bankruptcy law then in force contributed in no small degreee to the repeal of the Canadian Act—helping as it did to discourage the supporters of bankruptcy legislation here and to confirm the opponents of it in their antagonism—we may digress for a moment to glance at some of the defects in the English Act which gave rise to the aforesaid dissatisfaction and agitation.

In most respects the English Act of 1869 was an admirable one, but the English practitioner discovered in it what in the slang of the present period may be called a "joker."

Sections 125 and 126 of the Act contained provisions enabling a debtor to present a petition in court for liquidation of his affairs by arrangement or on payment of a composition. On presentation of this petition a meeting of creditors was to be summoned, but the names of the creditors were furnished by the debtor himself. No judicial investigation of the right of these creditors to be deemed creditors was held. A majority in number and value after lodging proof of their claims could by resolution agree to liquidation by arrangement and to the acceptance of the composition. That resolution then became binding on all other creditors without any act of approval by the court, any judicial examination of the debtor, or any judicial examination of the trustees' account. The consequence was that most of the proceedings under that Act were taken under these sections. After the Act had been in force ten years the comptroller in bankruptcy reported 13,000 annual failures in England and Wales, and of these 12,000 were taken under sections 125 and 126. The facilities for fraudulent and collusive arrangements afforded by the Act and the want of effective control over the administration tended to lower the morale of the proceedings and to throw the control of them into the hands of the less scrupulous members of the profession. The demands for reform were frequent and came from all classes of the business community. Thirteen bills dealing with the subject were introduced into the English House of Commons between 1869 and 1879. At length, in 1879, a memorial signed by a large body of bankers and merchants in the City of London, a memorial described as "one of the most influential memorials ever presented to any Government," was forwarded to the Prime Minister. The matter was referred to the President of the Board of Trade, who was Mr. Joseph Chamberlain. Exhaustive inquiries were made under his direction and in 1881 a measure was introduced which with some amendments finally became law under the title of "The Bankruptcy Act of 1883." This Act, with some amendments, is still in force in England and is giving satisfaction. One underlying principle of the Act is—the estate for the creditors, not for the debtor or for the

trustee. The other underlying principle is—commercial morality. The dealings of an insolvent debtor with his estate are not matters which concern only him and his creditors; the community is also vitally interested therein. Therefore, the Act, while just and generous to the honest and unfortunate trader, penalizes the incompetent and dishonest and endeavours to protect the trading community from his incompetency and dishonesty.

Debates of 1879 *and* 1880.

The agitation for the repeal of the English Bankruptcy Act of 1869 synchronized then, as we have said, with the debates in the Canadian House of Commons on the same subject in 1879 and 1880.

In 1879 a resolution was proposed by the leader of the Government to refer three Bills which had been introduced in that session dealing with the question of insolvency legislation to a select committee, whose duty it should be to enquire into and consider all questions of insolvency and bankruptcy. On the debate on this resolution many speakers on both sides of the House strongly opposed the continuance of bankruptcy legislation, but the resolution to refer was, nevertheless, passed, and the Committee was appointed. Later in the same session they brought in their report and proposed the repeal of the old law and the enactment of a new Act. An amendment was moved to approve the report of the Committee in so far as it related to the repeal of the old Act, but not to enact any new law. Somewhat unexpectedly this amendment received an affirmative vote in the House, but was rejected in the Senate. Next year, however, a Bill to repeal the existing Act was again passed in the House, and this time it received the support of a majority in the Senate, and the Insolvent Act of 1875 was repealed.

Thenceforward creditors were compelled to protect themselves against one another by means of the more or less imperfect remedies provided by provincial enactments. Debtors had several courses open to them:—

1. They could leave the country.

2. They could carry on business in the names of their wives and defy their creditors.

3. They could form limited liability companies.

4. They could obtain precarious credit.

5. They could await the Statute of Limitations.

6. They could obtain a discharge from such of their creditors as were willing to grant it and could settle with or pay the others.

The honest, capable man, unwilling to adopt any device derogatory to his manhood was practically prohibited from giving to the community the benefit of his services except as the hired servant of others more fortunate than, but possibly not so capable as, himself..

Objections urged in Parliament.

When the debates in Parliament are examined it will be found that the reasons given for the repeal did not go to the root of the matter. The fault of the law was not so much in its principle as in its administration.

Among the objections were:—

1. The Act gives too great a facility to debtors to make private arrangements with their creditors.

2. The throwing of bankrupt stocks on the market deranges business and militates against the honest trader.

3. The only man who needs protection is the honest, but unfortunate, debtor and to such a debtor the commercial community will be indulgent without a bankruptcy law.

4. A bankruptcy law the benefits of which are enjoyed only by traders, induces a great many people to go into business who otherwise would not.

5. Bankruptcy laws encourage rash speculation and induce a great many improvident persons to go into speculation into which they would not venture if they did not know that they had a chance of getting a discharge from their liabilities if they should be unsuccessful.

6. The Act is too expensive in its operation. In most cases creditors are pleased to enter into deeds of composition in order to get anything at all.

7. The assignees and lawyers are too rapacious and it is to their interest to prolong the proceedings and increase the expense. Under the old system one man, namely, the man with the first execution in the sheriff's hands, got his pay. No one gets it now. Nobody gets paid. They had raised up a class of official assignees who took it all.

8. Confining the operation of a bankruptcy law to traders is class legislation. The Act is detrimental to farmers and other classes of society who are shut out from the privileges of the Act. A trader got a non-trader to endorse his note, and after a while got into difficulties. He would call his creditors together and could get relief from his creditors, but the non-trader who had endorsed his paper must pay up to the last farthing and might be ruined thereby.

9. One reason for the unpopularity of the Act was the absence of proper supervision of the assignees. Were there Government inspectors to supervise all the acts of the assignees things might be otherwise. Many official assignees manage by some means to find out the affairs of persons in business and facilitate their bankruptcy.

10. Another reason for the unpopularity of the Act in Ontario was the permission to creditors to name an assignee outside the province, while there was no power to bring one who had acted improperly to the province to make him disgorge.

11. At a meeting of creditors one or two of those who held the heaviest claims were appointed inspectors, and they took good care of their own interests. They come to an understanding among themselves whilst the less fortunate suffer. The law did not protect those who did work for the merchants—the mechanic, the working man, the professional man, all those who work.

Rural Opposition.

It will be seen from these suggestions urged in the House of Commons debate at the time, that one of the powerful causes operating to bring about the repeal of the Act was the fact that only traders were entitled to its benefits. These objections

were urged more especially by members representing rural constituencies. Repeatedly it was pointed out by such members that the majority of their constituents, farmers, mechanics, and professional men, received no benefit from the Act, though compelled to bear their share of the loss resultant.

Other causes more or less unconnected with the merits of the Act itself that conduced in no small degree to its repeal were:—

Predominance of Quebec.

The fact that in Lower Canada they had a provincial law which enabled a creditor to hold an insolvent's property for the benefit of all creditors. It was pointed out that Clause 766 of the Code of Civil Procedure provided a much more simple, much more expeditious, and much less unjust remedy, and that the inhabitants of Quebec had the great advantage of protecting the unfortunate debtors from the bite or embrace of the official assignee. The strongest opposition came from the Province of Quebec.

Is a Bankruptcy Law Vicious?

The Commons were also influenced, as has been already mentioned, by the fact that in England they had not as yet succeeded in devising a satisfactory bankruptcy procedure. The same thing was at this time also true of the United States. There was in fact much dissatisfaction in both these countries with their existing laws. It was strongly urged that this dissatisfaction proved the contention that all bankruptcy laws were inherently vicious and incapable of successful enforcement, and that it was no use trying to amend them.

Many of the complaints were well founded. Parliament, however, overlooked the fact that no real argument against the principle of bankruptcy laws had been brought forward. The objections, formidable as they were, were not to the substantive, but to the adjective portions of the law. The principle of the bankruptcy law was correct. The method of the administration and enforcement thereof was defective. All that was needed

was the man to find the remedy. The man was found. He was the long-sighted, clear-headed, and capable Joseph Chamberlain, then occupying the position in the English Cabinet of President of the Board of Trade. After exhaustive enquiries he found the remedy, and for nearly thirty years the Act introduced by him, and which became law in 1883, has been administered in England, in such a way as to secure bankrupts' estates for the creditors and justice, not slavery, for honest debtors. Similarly in the United States, after various experiments, Congress upon a careful and exhaustive inquiry into the operation and effect of bankruptcy laws in other countries, enacted a national bankruptcy law in 1898, which, with some amendments made in 1903, has been the law ever since and gives every evidence of being entirely satisfactory to the nation at large.

Comparison of Failures in Canada with those in England and in the United States.

That a bankruptcy law does not tend to increase the number of failures is apparent from a comparison between the number of failures in Canada in the past four years as against the number of failures in the United States and England.

Canada.

Year	*Number of Failures*	*Assets*	*Liabilities*	*One failure for every*
1908	1,713	$7,767,207	$17,577,201	3,885
1909	1,581	6,156,915	12,724,384	4,325
1910	1,459	6,961,147	15,525,134	4,810
1911	1,399	6,399,647	12,799,001	5,000
			Average	4,500

United States.

Year	*Number of Failures*	*Assets*	*Liabilities*	*One failure for every*
1908	15,690	.....	$222,315,684	5,655
1909	12,924	.....	154,603,465	6,995
1910	12,652	.....	201,757,097	7,270
1911	13,241	.....	186,498,823	7,060
			Average	6,745

England and Wales.

Year	*Number of Failures*	*Assets*	*Liabilities*	*One failure for every*
1907	4,111	£1,917,338	£5,673,623	8,916
1908	4,306	2,103,492	5,509,949	8,040
1909	4,070	2,154,034	5,804,142	8,700
1910	3,860	2,867,068	8,211,678	9,200
			Average	8,714

These figures for England and Wales represent the numbers of receiving orders made under the Bankruptcy Act, and do not include cases of insolvency under deeds of arrangement. The exact figures for these latter are not available, but the indications are that if they were included the number of inhabitants to a failure would still be over 5,000. It would appear, therefore, from the foregoing that there are as many or more failures in a country without a bankruptcy law as in analogous countries possessing such an enactment.

English Act of 1883.

The salient features of the English Bankruptcy Act of 1883, may be said to be as follows:—

1. An independent and public investigation of the debtor's conduct.

2. The punishment of commercial misconduct and fraud in the interests of public morality.

3. The summary and inexpensive administration of small estates.

4. Full control by a majority in value of the creditors of the appointment of a trustee and a committee of investigation.

5. Strict investigation of the proofs of debt with regulations as to the proxies and votes of creditors.

6. Provision that no arrangements between creditors and debtors, or compositions by deed or by resolution, should have any force against dissenting creditors, unless confirmed, after full investigation by the Bankruptcy Court.

7. An independent audit and general supervision of the proceedings and control of the funds in all cases.

In 1908, after the law had been in force for 25 years, a Committee of the Board of Trade, after making full enquiry into the working of the English Act, and into those of Germany, France, Australia, Scotland and Ireland, reported that the result of their enquiry did not disclose any dissatisfaction on the part of the commercial community with the main features of the then existing law and procedure. Improvements were suggested in certain minor aspects of the law and certain branches of its administration, but with regard to the general scheme they recommended no change.

It has already been pointed out that other parties are interested in insolvency than the creditors and the debtor.

Unless restrained by legal enactment, the predominant characteristic of the human mind is selfishness. Every man is more or less dominated by what is best for his own interests. It matters little to creditors that it is unsafe to the community that their debtor should be allowed to carry on his trade. On the other hand it also matters little to creditors that their debtor has talents and enterprise, which if allowed free scope, would be of great value to the community. In the one case, if he is willing to offer them five or ten cents more on the dollar than they can collect from his estate they will give him a discharge, and allow him to prey generally upon the community, until he again fails, and pays only a percentage of his debts. In the other case, unless the debtor's friends are willing to come to his aid, and recognizing his talents and enterprise, are willing to contribute out of their own means towards his debts, they are willing that he shall be handicapped with such a load of debt as to deprive the community of his services. His only reliefs are the Statutes of Limitation, the generosity of such of his creditors as recognize both his honesty and ability and, thirdly, the satisfaction of the demands of those sordid individuals who refuse to give a man a chance until they have first extorted the uttermost farthing. The trading community does not sufficiently recognize that the dishonest trader is a menace to the community, nor that it is impossible for the honest man who pays one hundred cents on the

dollars to compete with the man who frequently fails and pays only a percentage of his debts. Many men are reputed to have become rich by so administering their affairs as to fail for a sufficiently large amount.

Proposed Remedies.

It would be beyond the scope of this paper to attempt to work out the details of a Canadian bankruptcy law. The English and American Bankruptcy Acts contain sufficiently ample measuring rods to enable a satisfactory Act to be framed.

The particular points to be observed are:—

1. Every debtor must be compelled to submit to a public examination before a judicial tribunal respecting his conduct and he must be compelled to explain the reasonable and probable causes of his failure in business.

2. No man whose failure has not been brought about by misfortune should be entitled to a discharge.

3. All undischarged bankrupts should be incapable of obtaining credit and should be incapable of holding public office and positions of trust.

I would, therefore, suggest:—

1. That there should be enacted in Canada a uniform law, governing all matters coming within the ambit of bankruptcy legislation. Creditors in Toronto or Montreal should be able to know that the remedies against a defaulting debtor resident in Halifax are equally as good and as readily available as the remedies aginst a debtor in Vancouver.

2. The administration of the bankruptcy laws should be committed to the Superior Courts of the various provinces and the judges of the various county and other local courts should be Referees in Bankruptcy.

3. Upon the commission of an act of bankruptcy the creditors should have a summary and speedy remedy against the entire estate of a debtor.

4. The creditors should have the entire control of the administration of assets and should be at liberty to say whether the

assets should be administered under the supervision of the courts or by a trustee of their own choosing.

5. No composition should be effective or should entitle the debtor to a discharge unless first confirmed by the court after full enquiry into (*a*) the conduct of the debtor, (*b*) the claims of the creditors, (*c*) the objections of dissentients, or the expenses attendant thereon.

6. Inasmuch as the state is entitled to the benefit of the services of all its subjects no creditor should be allowed to hold in bondage the soul, body or talents of any of its subjects merely because he has been unfortunate.

7. If a debtor is not able to give an adequate, reasonable and satisfactory account of the transactions causing his failure, his future earnings should be impounded for the benefit of his past creditors until they have been sufficient to pay a reasonable percentage upon the dollar of his creditors' claim.

8. Dishonest and incompetent traders should be stigmatized as undischarged bankrupts and should be incapable of engaging in trade or contracting debts without reasonable prospects of paying them.

9. There should be an official supervision over the accounts of all trustees.

10. A central bureau should be established in each province, presided over by a Superior Court judge by whom all bankruptcies would be supervised, thus ensuring both uniformity and honesty of administration.

11. The guiding principle should be "the estate for the creditors." The procedure should be so simple and expeditious as to produce the speediest and best results.

12. Every debtor should be compelled to submit a full statement of his assets and liabilities and the reasons for his failure at the first meeting of his creditors and should thereafter be examined in open court before a judge, in the presence of his creditors, and should thereupon be called upon to answer all questions which might be put to him by counsel or any of his creditors with regard to his affairs, and any prevarication or

failure to make a satisfactory explanation should be punishable as contempt.

13. The bankruptcy law should be available to all debtors, both traders and non-traders.

14. The wage-earner and the possessors of small estates who perhaps have fallen into the hands of loan sharks should be enabled to have their estates administered in bankruptcy at a minimum of expense.

15. The present system of appointing assignees has been found in the main to work satisfactorily and subject to the control of creditors should be permitted to continue, but for the administration of small estates and estates over which creditors do not care to take control, a salaried official should be appointed in each province, who would officially supervise all such small bankruptcies and enable justice to be done both to the creditor and the debtor without undue expense.

I should like to conclude this paper by an extract from the report of the committee appointed in 1906 by the English Board of Trade, which report was published in 1908. The committee in its report, speaking in general terms of the bankruptcy law existing in England, says:—

"The evidence and documents placed before us do not disclose any dissatisfaction on the part of the commercial community with the main features of the existing law and procedure; while evidence and statistics from official sources shew that there has been a large reduction in the amount of insolvency throughout the country since the present system came into force. The matters of complaint and suggestions for reform of the law which we have had to deal with have principally related to special incidents of the law and branches of its administration."

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

By the Honourable Mr. Justice Riddell, L.H.D., LL.D., Etc.

(*Second Paper.*)

While watchful over the conduct of its own officers, the court did not omit to exercise strict supervision over the inferior courts.

The first courts in Upper Canada were the four courts of Common Pleas, one for each of the districts into which what afterwards became Upper Canada had been divided by Lord Dorchester by proclamation, July 24th, 1788, viz.:—Luneburg, Mecklenburg, Nassau and Hesse. These courts were abolished in 1794 by 34 George III., c. 2, and new district courts for each district were organised in the same session, c. 5; these later on, in 1849, became County Courts. Before this time, *i.e.*, in 1792, by 32 George III., c. 6, inferior courts called Courts of Requests had been constituted to be presided over by one or more justices of the peace and afterwards by Commissioners; these ultimately gave way to Division Courts. There were also courts of General Quarter Sessions of the Peace, composed in fact of the justices of the peace of the district, with large criminal jurisdiction, particulars of which may be found in Blackstone's Commentaries, Book IV. pp. 271 et seqq. These have become the General Sessions in which the County Court judge is in fact the only presiding officer, although in theory, the magistrates are sitting with him. Commissions of Oyer and Terminer and General Gaol Delivery also issued. Over all these courts, the Court of King's Bench, instituted in 1794 by 34 George III. C. 1, exercised authority.

We have seen how a judge of a District Court was punished for taxing too high fees to an attorney; and there are many other instances of the court exercising its supervisory jurisdiction (see Blackstone's Comm. Book III., pp. 42, seqq.).

In Easter term, 4 George IV., May 14th, 1824, (Praes. Powell, C.J., Campbell and Boulton, J.J.) "*E. Edmunds* v.

Harnack; Motion for a mandamus nisi to David McGregor Rogers, Esq., judge of the District Court of Newcastle, commanding him to enter final judgment upon the interlocutory judgment and assessment of damages in this cause now pending in his court; J. B. Macaulay, Granted and issued."

No further proceedings were taken in court in this case; it is probable that judgment was entered up properly on service of the mandamus nisi. Mr. Rogers was also member of Parliament and registrar of deeds.

In Easter Term, 4 George IV., May 1, 1824, (Praes. Powell, C.J., Campbell and Boulton, JJ.): "*The King* v. *Bullock et al.* Motion for a rule to shew cause why an attachment should not issue against Richard Bullock and Sheldon Hanby, Esquires, Commissioners of the Court of Requests in the district of Newcastle, for corruptly giving judgment against the defendant in a suit of *Samuel Heath* v. *Isaac Brown*, for £2 1s. 10d., D. & C.; J. Macaulay; granted and issued." ("D. & C." means of course, "Damages and Costs.") Nothing further was done in this case; it is probable the defendant found he had made a mistake.

In Hilary Term, 5 George IV., January 27, 1825 (Praes. Powell, C.J., Campbell and Boulton, JJ.): "*Jas. & Wm. Allan* ats. *Henry Woodside* in the District Court. Motion for a writ of certiorari, directed to the judge of the Newcastle District Court to remove the proceedings in this cause into this court; G. Boulton; not granted." With this may be compared *In re Erb* (No. 2), 1908, 16 O.L.R. 597. ("ats." means "at the suit of.")

In Easter Term, 7 George IV. April 19th, 1826, (Praes. Campbell, C.J. and Sherwood, J.) "*In re Edward McBride, Esq.* Motion for a rule to shew cause why a mandamus should not issue to the justices of the peace in the Niagara district directing them to grant the usual order upon the treasurer of the said district for the wages of Edward McBride, Esq., a member representing the town of Niagara in the district of Niagara in Provincial Parliament; J .B. Macaulay, Esq. for E. McBride, Esq. The court not prepared to give any order on this motion:" April 29th, 1826, "Stands for judgment:" Nov. 14th, 1826, "Stands for

further argument:" Nov. 14th, 1826, "Refused." This was a very curious case; in 1793 the Act, 33 George III., c. 3, provided for the payment of wages to the members of the House of Assembly by the district in which their riding was situated. At the time of the passing of this Act, no town had any member in the assembly. By the Act of 1820, 60 George III., c. 2, towns of 1,000 population or over, in which the Quarter Sessions were held, were given a member. Niagara elected Edward McBride —the magistrates refused to give an order to the treasurer to pay him the wages he claimed, and he applied to the court—but after two arguments and much consideration, his application was refused. The reasons will be found in Taylor's Reports, p. 542. It was not till 1835 that members for towns were paid wages like their fellow-members who represented counties, 5 William IV., c. 6.

In Trinity Term, 7 George IV., June 20th, 1826, (Praes. Campbell, C.J., and Sherwood, J.) "*The King* v. *John Eagleston, Elizabeth Slingsland and Peter Ball*; Indictment for a nuisance in stopping the King's highway. Motion for a rule to shew cause why a mandamus should not issue to the magistrates of the Niagara district in Quarter Sessions assembled, commanding them to pass judgment against defendants upon the above indictment on the verdict rendered at the last Court of General Quarter Sessions of the Peace, holden in and for the Niagara district; J. B. Robinson, Esq., for prosecutors. Granted and issued to J. B. Macaulay, Esq." In Michaelmas Term, 7 George IV., Nov. 18th, 1826, this rule was made absolute on motion of J. B. Macaulay, Esq., (Praes. Campbell, C.J., Boulton and Sherwood, JJ.).

Macaulay was the son of Dr. Macaulay, Inspector-General of Hospitals; himself an ensign in the 98th Regiment of Foot, he took part in the war of 1812, as lieutenant in the Glengarry Fencibles. He was present at Ogdensburg, Lundy's Lane and Fort Erie. Called to the Bar in 1822, he afterwards became a Justice of the King's Bench; and when the Court of Common Pleas was organized in 1849, he was the first chief justice of

that Court. He resigned in 1856, and next year was knighted, and appointed a judge of the Court of Error and Appeal. He died in 1859, at Toronto, at the age of 66.

The result of the rule being made absolute was that the magistrates were compelled to pass sentence upon those convicted of a public nuisance.

A case a little earlier, in July 1823, may be mentioned here. There was a Presbyterian congregation at Lancaster or Williamstown, which desired a pastor. A number of the members signed a subscription paper promising to pay $6 each per annum towards a minister's salary. A minister came out from Scotland on the faith of this promise, but some did not pay. Thereupon the elders and committee of the church sued one of them, Wood, in the Court of Requests; McIntyre was one of the commissioners who sat in the court: he was one of the elders of the church and one of those to whom the promise was made. McKenzie was another commissioner; he also was interested to the extent that he was bound to pay the minister's salary. McMaster the third commissioner was also interested, but refused to sit. McIntyre and McKenzie sat and gave judgment against Wood. An attachment was moved for against all three along with Alexander Fraser, a fourth commissioner, who did not sit at all. The court ordered an attachment to issue against McIntyre and McKenzie. They were brought from the other end of the province to Toronto at their own expense, a distance of nearly three hundred miles, and, making due submission, were discharged, but made to pay all the costs of the proceedings. See Taylor's Reports 1823-1824, pp. 21, 85, seqq.

There are many instances of certiorari for the purpose of quashing convictions: but these are not different, in substance, from what we see every day at Osgoode Hall at the present time.

Certain of the proceedings look exceedingly strange to a modern barrister. Many entries are found like the following:—

In Easter Term, 7 George IV., April 17, 1826, (Praes. The Chief Justice, Powell). "*Isaac Swayze* v. *John Bissell*; Motion

for the usual allowance of five shillings, defendant being an insolvent debtor in the gaol of the Niagara District; J. B. Macaulay, Esq. for defendant. Granted and issued."

The unfortunate defendant had had a judgment entered against him, and the plaintiff had caused a writ of ca. sa. to be issued under the then existing practice, under which the defendant was arrested by the sheriff and committed to the common gaol till he should pay the debt—this "arrest on final process" was a not unusual proceeding. The district should not be called upon to support a debtor in gaol and often the debtor himself could not. Much suffering was the result as any reader of Dickens will have seen; Mr. Jingle's lot was not unique. Accordingly the Provincial Act was passed (1805), 45 George III., C. 7, which provided "that if any prisoner in execution for debt shall apply to the court whence such execution issued and make oath that he or she is not worth five pounds, the plaintiff at whose suit, he or she is detained, shall be ordered by the court . . . to pay to the defendant . . . the sum of five shillings weekly maintenance . . . in advance . . . on failure of which the court . . . shall order the defendant to be released." Many stories were told of releases under this Act—one of the favourites and one I have heard from old Canadians scores of times, is that after an order of this kind had been made, the plaintiff one morning unfortunately paid as part of the five shillings, a bad half-penny, whereupon the defendant, being in the Cobourg gaol, applied to the court, and the court was forced to release him from custody. There is much virtue in a "shall."

The court went so far as to decide that it was no excuse for the non-payment of the allowance that the defendant had become possessed of property subsequent to his obtaining his order for allowance; *Williams* v. *Crosby* (1823), Taylor 16. But where a defendant had applied to the court for his release, and, expecting to succeed in this application, had while the application was pending, refused to accept the weekly allowance, he was not allowed the arrears when his application failed: *Moran* v. *Maloy* (1827), Taylor, 563, ignorantia legis neminem excusat.

It appears from the Term Book, Hilary Term, 7 George IV., Jan. 2nd, 1827, that this judgment was given by the full court, Campbell, C.J., Boulton and Sherwood, JJ., and that the defendant lost six weeks' allowance by his caution.

The Statute of 1822, 2 George IV., C. 8, allowed interrogatories to be exhibited to a defendant in execution, which he must answer on oath shewing his property and his disposition of it, etc. This put a stop to a certain amount of fraudulent concealment of property.

WILLIAM RENWICK RIDDELL.

POOR SUITORS.

No provision is made by the Ontario Rules of Practice for the case of poor Suitors. Possibly the former Chancery practice as to suing in formâ pauperis prevails, under the combined effect of the Jud. Act, s. 128, and s. 58 (13). But this is not absolutely certain, and there is no case, that we are aware of, in which the question has been raised.

It seems desirable that explicit provision should be made by the Rules on the subject. In England, recently, a very hard case was carried up to the House of Lords by the plaintiff in formâ pauperis and the judgment of the court below reversed: *Lloyd* v. *Grace,* 1912, A.C. 716. In that case the plaintiff, a poor woman, had gone to a solicitor's office to consult about her property, and under the fraudulent advice of the managing clerk of the firm, she transferred to him all her property and he then made away with it, and the poor woman was reduced to poverty. —She brought an action against the firm of solicitors, which was dismissed by the lower courts on the ground that the clerk in taking the conveyance to himself was not acting within the scope of his authority; but the House of Lords held that he was, and that the defendant was liable to make good the loss occasioned by his clerk's fraud. But for the provisions of the English practice enabling proceedings to be taken formâ pauperis this gross wrong would have been unredressed.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

CHURCH OF ENGLAND CURATE — EMPLOYMENT — CONTRACT OF SERVICE—MASTER AND SERVANT.

In re National Insurance Act (1912) 2 Ch. 563. This was a case arising under the National Insurance Act and may be noticed briefly for the fact that it is a judicial decision of Parker, J., that the status of an English incumbent and his curates, and of the bishop and a curate, is not that of employer and employed, whether the curate be formally licensed under the bishop's seal or is acting under the bishop's temporary permission—but the curate is a person holding an ecclesiastical office, and he is not in the position of a person whose duties and rights are defined by contract.

COMPANY — PREFERENCE SHARES — DISTRIBUTION OF PROFITS — ORDINARY SHARES—RIGHTS OF PREFERENCE AND ORDINARY SHAREHOLDERS INTER SE.

Will v. *United Lankat Plantations Co.* (1912) 2 Ch. 571. This was a contest between preferential and ordinary shareholders of a limited company—the former claiming that, after the ordinary shareholders had been paid a dividend equal to that paid on the preferential shares, then any surplus profits were divisible between both classes of shareholders. Joyce, J., gave effect to this contention, but the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) reversed his decision, holding that where preference shares are given a fixed preferential dividend at a specified rate the right of the holders of such shares to any further dividend is impliedly negatived.

COMPANY—MEMORANDUM OF ASSOCIATION—BUSINESS OF LIFE INSURANCE PROHIBITED—INVESTMENT POLICY—PROVISION FOR RETURN OF PREMIUMS IN EVENT OF DEATH BEFORE FIXED PERIOD—ULTRA VIRES.

Joseph v. *Law Integrity Insurance Co.* (1912) 2 Ch. 581. In this case the question was whether certain policies issued by the defendants were ultra vires of the company which was incorporated to carry on every kind of insurance and guarantee business except the business of life insurance. The company

had issued a number of "investment" policies which were in one or other of two forms. The first form which was described as an investment policy purported for a weekly premium of 6s. to secure £22 10s., namely, £6 at the end of five years, £7 10s. at the end of ten years and £9 at the end of fifteen years, and the policy was made a charge on the assets of the company and provided that in the event of the death of the assured before the fifth year all premiums would be returned in full, and after the fifth and tenth years all premiums paid since the last payment by the company would be returned. The other form of policy purported to secure the payment of a specified sum at the end of a fixed term in consideration of a weekly premium and was also made a charge on the assets of the company and provided that in case the assured died before the date when the sum would become payable, a percentage of the premiums received should be payable to the representatives or assigns of the assured. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.) held on appeal from the Vice-Chancellor of the County Palatine of Lancaster that both forms of policies were policies of life insurance, and therefore ultra vires, and were also illegal because the company had not made the deposit required from life insurance companies.

DESIGN—INFRINGEMENT—PATENTS AND DESIGNS ACT—1907 (7 Edw. 7, c. 29) s. 60—COPYRIGHT.

Haddon v. *Bannerman* (1912) 2 Ch. 602. This was an action for an injunction and damages for infringement of the plaintiff's registered design. The Patents and Designs Act, 1907, provides "During the continuance of copyright in any design it shall not be lawful for any person for the purposes of sale to apply or caused to be applied to any article in any class of goods in which the design is registered the design or any fraudulent or obvious imitation thereof except with license or written consent of the registered proprietor, or to do anything with a view to enable the design to be so applied." The plaintiffs were registered proprietors of a design for type metal letters, the claim being for the pattern. The defendants were manufacturers of matrices and moulds in which types are cast and had recently sold and delivered to the India Office in London matrices for casting type of the plaintiffs' registered pattern, for purposes of sale in India. It was admitted that the matrices were for shipment to Madras and that the design would not be

applied to any type in the United Kingdom, and Warrington, J., held that although the copyright in the design afforded no protection to the plaintiffs in India, still the acts of the defendants in England were in contravention of the above mentioned section of the Patent and Designs Act.

WILL—SPECIFIC GIFT OF FOREIGN PROPERTY—COSTS OF REALIZATION—POWER—DIVISIBILITY OF POWER—PERPETUITY.

In re De Sommery Coelenbier v. *De Sommery* (1912) 2 Ch. 622. This was a case turning on the construction of a will. the testatrix, who was domiciled and died in England, gave all her real and residuary personal estate except her shares in a certain French company to her executors "my trustees" upon trust for sale and to hold the net proceeds after payment of her debts, and funeral and testamentary expenses, to pay a charitable legacy, and to divide the residue into thirteen parts as to two of such parts upon trust "to pay the capital or income thereof or neither to my nephew Eugene, or to apply the capital or income or any part thereof either for his benefit or for the benefit of his wife or any child or children of his as my trustees in their absolute and uncontrolled discretion consider desirable" —and she gave the 21 shares in the French company to "my trustees" upon trust for certain persons. Some of the shares were charged with the payment of certain legacies. Shortly after the testatrix's death the trustees sold some of the shares and applied the proceeds in paying a legacy charged on seven of the shares, and in completing their title according to French law the trustees paid succession duty claimed by the French government and incurred certain costs. One of the questions Parker, J., was called on to decide was whether the succession duty and costs thus paid were a charge on the general estate or were payable out of the shares, and he decided that the trustees being also executors must as such have assented to the gift of the shares to themselves and after such assent held the shares as trustees and not executors and that the French duty and costs must be borne by the shares. The other question was as to the validity of the power of appointment in favour of the nephew Eugene. And as to this it was held that there were two powers vested in the trustees for the time being of the will, first to pay either capital or income to Eugene which was only capable of being exercised during his life, and secondly, a power to apply either capital or income for the benefit of E., his wife

or children, which, if valid, would be exercisable beyond the period allowed by law; and that therefore the first power must be held to be good, but the second must be rejected as invalid.

HIGHWAY—DEDICATION—DEPOSITED PLAN—USER BY PUBLIC—ADJOINING OWNER—RIGHT OF ACCESS TO HIGHWAY.

Tottenham v. *Rowley* (1912) 2 Ch. 633. This was an action by a municipal body to restrain the obstruction of a highway by the defendants. The facts were, that the defendant had laid out a building estate and deposited a plan with the plaintiffs on which the road in question was indicated, forty feet wide. One-half of this road was subsequently made up and metalled by the defendant and the other half was left as a footpath. Thereafter the public used the road and as a rule preferred the part which was metalled. The plaintiffs owned property on the unmetalled side of the road and opened an entrance therefrom into the highway, which the defendant obstructed. The Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.), affirming Joyce, J., held that the deposit of the plan coupled with the subsequent use of the road by the public constituted a sufficient dedication of the whole highway and not merely of the metalled portion, and that the plaintiffs had a right of access thereto as claimed, and that notwithstanding that the unmetalled portion might be intended to be appropriated as a footpath, the plaintiffs had a right to cross it on foot or with vehicles at reasonable times and to a reasonable extent. As the Master of the Rolls puts it, "It is not open to the defendant to say 'I intended to dedicate to the public without giving any right to the adjoining owner.' He doubts whether any such dedication is possible in law. If it is, it must be made out on the clearest evidence, which he held was not forthcoming in the present case.

JOINT TENANCY—CHOSE IN ACTION—POLICY ON TWO LIVES IN FAVOUR OF SURVIVOR—PREMIUMS PAID BY ONE JOINT TENANT AT THE REQUEST OF ANOTHER—SET OFF—EQUITY—LIEN—ASSIGNMENT BY ONE JOINT TENANT.

In re McKerrell, McKerrell v. *Gowans* (1912) 2 Ch. 648. This was a proceeding to determine the rights to a policy of insurance. The policy in question had been effected by a husband and his wife on their respective lives, the amount insured being payable to the survivor of them. Each party was to pay

half the premiums; but the wife, at her husband's request, from time to time paid his moiety which he was unable to pay. The husband eventually made a general assignment of his property for the benefit of creditors and thereafter died. The assignment did not specifically mention the policy and no notice of the assignment was given to the insurance company. At the time of the husband's death the aggregate of the premiums paid by the wife on his behalf exceeded one-half the net balance of the policy money after payment of certain prior charges thereon effected by both husband and wife. Joyce, J., doubted whether the husband's assignment passed any interest whatever in the policy save such as he might have had therein if he had survived his wife—but that, even if it did, the plaintiff, the wife, was as survivor legally entitled to the policy and any claim the assignee could have would be merely equitable, and he could only get relief on the terms of doing equity and allowing to the plaintiff to set off the premiums paid by her for her husband, for which she was also equitably entitled to a lien on the policy moneys.

FRAUDULENT CONVEYANCE—VALUABLE CONSIDERATION — ANTECEDENT DEBT—13 ELIZ. C. 5, S. 6—(1 GEO. V. C. 24, SS. 1, 5, ONT.).

In *Glegg* v. *Bromley* (1912) 3 K.B. 474, the point in controversy was whether an assignment of a judgment debt in consideration of an antecedent debt owing to the assignee was void under the Statute of Elizabeth. The facts were as follows. Mrs. Glegg was plaintiff in action against one Hay for alleged false representation and she was also plaintiff in the present action claiming damages for an alleged slander. On May 21, 1910, Mrs. Glegg being then indebted to her husband in a large sum of money, by deed, reciting the indebtedness and his requirement of security therefor, assigned to him all sums of money which she might become entitled to by virtue of any verdict, compromise or agreement in the action of *Glegg* v. *Bromley*. On 6th June, 1910, the action of *Glegg* v. *Hay*, was dismissed with costs taxed at £218. On 7th July, 1910, the action of *Glegg* v. *Bromley* was tried and the plaintiff recovered a verdict for £200. Mr. Hay then obtained a garnishee order attaching the damages to satisfy debt due to him for costs. The husband of Mrs. Glegg claimed them under his assignment and the question therefore was whether this assignment was valid as

against him under the Statute of Elizabeth (1 Geo. V. c. 24, ss. 1, 5, Ont.). The Divisional Court (Coleridge, and Hamilton, JJ.), held that the antecedent debt due to the husband was not of itself a valuable consideration under the Statute of Elizabeth (1 Geo. V. c. 24, s. 5, Ont.), and that the rule that in garnishee proceedings the attaching creditor in general only takes such rights as the judgment debtor has, does not preclude the attaching creditor from impeaching an assignment by the judgment debtor of the debt sought to be attached, as fraudulent, although at the date of the assignment he had not recovered his judgment on which his garnishee proceedings are based; and they gave judgment in favour of the attaching creditor. The Court of Appeal (Williams, Moulton, L.J., and Parker, J.), however, reversed this decision and although they concede that the mere existence of an antecedent debt is not of itself good consideration for a conveyance under the Statute of Elizabeth, yet where, as in this case, it appears that the debtor has received forbearance and also has advanced further sums to the debtor, that such forbearance and subsequent advances coupled together constituted a good consideration within the statute. The Court of Appeal also held that, although the assignment of a tort would be invalid, yet, the assignment of damages recovered in respect of a tort was not open to objection. The judgment of the Divisional Court was therefore reversed and the assignment was upheld.

LANDLORD AND TENANT—LEASE—COVENANT NOT TO LET "ADJOINING SHOPS" FOR CERTAIN PURPOSES—MEANING OF "ADJOINING."

Cave v. *Horsell* (1912) 3 K.B. 533, is one of those cases which illustrate the fact that words are sometimes used in contracts in other senses than those given in dictionaries. In the present case a lessor covenanted with his lessee not to let "any of the adjoining shops" belonging to him for certain specified purposes during the continuance of the lease. The lessor owned five shops numbered 2 to 6. No. 4 was let to the plaintiff. Strictly speaking the adjoining shops were Nos. 3 and 5. During the term the lessor let No. 6 for one of the purposes specified, and the question was, whether this amounted to a breach of the covenant. Phillimore, J., who tried the action held that it did; and the Court of Appeal (Williams, Moulton and Buckley, L.JJ.) affirmed his decision; Williams, L.J., however, dissented. The majority of

the court were of the opinion that the word "adjoining" was not restricted to those houses immediately contiguous to No. 5, but, in the circumstances included the other two houses owned by the lessor. Williams, L.J., on the other hand, was in favour of the restricted interpretation, thinking the case was governed by *Ind. Coope & Co.* v. *Hamblin*, 84 L.T. 168.

CRIMINAL LAW—INDECENT ASSAULT—CONSENT — DIRECTION TO JURY.

The King v. *May* (1912) 3 K.B. 572. This was an appeal against a conviction for an indecent assault, on the ground that the judge omitted to give any direction to the jury on the question of consent on the part of the prosecutrix. But, it appearing to the Court of Criminal Appeal (Lord Alverstone, C.J., and Channell, Phillimore, Avory, and Horridge, JJ.) that there was no evidence from which the jury could reasonably infer any consent on the part of the prosecutrix, it was held not to be necessary for the judge at the trial to give any direction on that point.

MASTER AND SERVANT—NEGLIGENCE OF SERVANT—SCOPE OF EMPLOYMENT—SERVANT ACTING UNDER UNAUTHORISED ORDER OF GENERAL MANAGER—LIABILITY OF MASTER.

Irwin v. *Waterloo Taxi-Cab Co.* (1912) 3 K.B. 588. In this case the plaintiff was injured owing to the negligence of the defendants' servant in driving a taxi-cab belonging to them. The defendants sought to escape liability on the ground that at the time the negligent act took place the servant was driving the general manager of the defendant company on his private business, and not that of the company, and that the manager had no right to use the defendants' vehicles for that purpose. The action was tried by Pickford, J., and a jury, and judgment was given in favour of the plaintiff, which was upheld by the Court of Appeal (Williams, Moulton, and Buckley, L.JJ.), on the ground that the driver was acting within the scope of his employment in obeying the orders of the manager, even though the manager was exceeding his authority in giving the orders; because by the defendants' directions the driver was bound to obey the manager. The fact that the particular vehicle in question was by agreement of the defendants with a customer to be reserved for that customer's exclusive use, which fact was unknown to the driver, was held to be immaterial.

INSURANCE—CONCEALMENT OF MATERIAL FACT—ASSIGNMENT OF POLICY—ASSIGNEE FOR VALUE WITHOUT NOTICE—DEFENCE ARISING OUT OF CONTRACT.

Pickersgill v. *London and Provincial M. & G. Ins. Co.* (1912) 3 K.B. 614. The plaintiffs in this case were the builders of a vessel of which Brown & Co. were the owners, who agreed to transfer to the plaintiffs all policies of insurance effected by them on the vessel as security for the price. Brown & Co. effected insurances and assigned the policies to the plaintiffs. In effecting these insurances they concealed from the underwriters material facts. The plaintiffs took the assignment without notice. The Marine Insurance Act, 1906, provides, that an assignee of a policy of marine insurance may sue thereon in his own name, but that the defendant may set up any defence arising out of the contract, and it was held by Hamilton, J., who tried the action, that the non-disclosure of material facts being a breach of the condition precedent to the liability of the underwriters on the policies, was a defence arising out of the contract, and as such available to the defendants in bar of the action: see Ont. Jud. Act, s. 58 (5).

MANDAMUS—PREROGATIVE WRIT—COMMAND TO REPAIR BRIDGE—VAGUENESS OF COMMAND—RETURN TO WRIT.

Rex v. *Wilts and Berks Canal Co.* (1912), 3 K.B. 623. This was an application for a prerogative writ of mandamus requiring the defendants, a canal company, to repair and maintain a certain bridge in fulfilment of their public duty in that behalf. It was objected that the rule nisi was too vague and that the defendants would not know what they were required to do if the writ were granted as asked. Lord Alverstone, C.J., however, held that the command to repair the bridge in question was prima facie sufficiently explicit, and he granted it in the terms asked, leaving it to the defendants to raise the question on the return of the writ if so advised.

SHIPPING — CHARTER PARTY — CONTRACT OF AFFREIGHTMENT—DEAD FREIGHT—LIEN—UNSEAWORTHINESS—DEVIATION.

Kish v. *Taylor & Co.* (1912) A.C. 604. This was an appeal from the judgment of the Court of Appeal (1911) 1 K.B. 625 (noted ante vol. 47, p. 265), reversing a judgment of Walton, J. (1910) 2 K.B. 309 (noted ante vol. 46, p. 612). The action

was brought by shipowners against the holders of bills of lading to enforce a lien on the goods mentioned therein for dead freight. The facts being that the Mississippi Transportation Co. had chartered the plaintiff's vessel to proceed to Mobile and Pensacola and there load a full and complete cargo of timber to be discharged at ports in Europe. The vessel proceeded to Mobile and Pensacola, but the charterers failed to provide more than about eight-thirteenths of her full cargo. In order to mitigate the loss the Master procured cargo from other sources at less remunerative rates than provided by the charter party. Some of this additional cargo was loaded on deck, whereby the vessel became unseaworthy and part of it had to be jettisoned; and the vessel had to put into Halifax for repairs. The charter party provided for the payment of dead freight and gave the shipowners a lien on the cargo therefor. Notwithstanding these misfortunes the defendant's goods were delivered in time and in good order. The defendants contended that when the vessel became unseaworthy that was a breach of warranty which put an end to the charter party, and also that the deviation into the port of Halifax put an end to the contract, because it was rendered necessary by the plaintiff's own act in having rendered the ship unseaworthy by overloading it, and therefore that the plaintiffs could not recover under the charter party but only as common carriers. The Court of Appeal gave effect to these contentions, but the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten, and Atkinson) reversed their decision, holding that a contract of affreightment is not put an end to by deviation rendered necessary by unseaworthiness however it may arise.

ADMIRALTY—SHIP—COLLISION—TUG AND TOW—TUG IN COLLISION WITH THIRD VESSEL—TUG AND THIRD VESSEL—ADMIRALTY RULE AS TO DIVISION OF LOSS.

The Devonshire v. *The Leslie* (1912) A.C. 634. This was an admiralty case in which the question at issue was whether or not there is any principle of admiralty law which precludes an innocent vessel damaged by collision through the fault of two other ships, from recovering the whole loss from either of the delinquent ships. The House of Lords (Lord Haldane, L.C., and Lords Halsbury, Ashbourne, Macnaghten, and Atkinson) (affirming the Court of Appeal (1912) P. 21, noted ante vol. 48, p. 230) answer that question in the negative. The facts were that The Leslie, a dumb barge (i.e., a vessel having no propelling

apparatus), being in tow of a tug which had the sole control of the navigation, met The Devonshire, and the tug attempted to cross her bows; both the tug and The Devonshire were in fault, and The Leslie collided with The Devonshire and was damaged, and from her owners, the owners of The Leslie claimed to recover the full damages; the owners of the tug not being parties to the action. The owners of The Devonshire claimed that they were only liable for a moiety. The rule invoked by the defendants applies, as their Lordships hold, as between two ships, both to blame, and has no application to an innocent ship damaged by collision through the fault of other vessels. Their Lordships also hold that The Leslie was not identified with the tug, so as to be in any way prejudiced by its negligence, and on this point the cases of *Thorogood* v. *Bryan,* 8 C.B. 115; *The Bernina,* 13 App. Cas. 1, and *The Drumlanrig* (1911) A.C. 16, are discussed.

WILL—LEGACY—REVERSIONARY FUND—NO TIME FIXED FOR PAYMENT OF LEGACY—DATE FROM WHICH INTEREST ON LEGACY RUNS.

Walford v. *Walford* (1912) A.C. 658. This was an appeal on a somewhat insignificant point, viz., from what date interest on a demonstrative legacy begins to run where no time is fixed for payment; but as the legacy was for £10,000 the amount involved was possibly large. By the will in question the testator, who was entitled to a fund in reversion expectant on the death of his father, appointed to him under the will of his mother, subject to his father's life interest, bequeathed to his sister £10,000 to be paid out of the estate and effects inherited by him from his mother; and the residue of his estate inherited by him from his mother and of all his estate and effects then in his possession he gave to other persons. On the death of the father the question was raised from what date the £10,000 carried interest. The Court of Appeal held as no date was named for payment and no direction express or implied postponing payment till the calling in of the reversionary fund, it bore interest one year from the testator's death (1912) 1 Ch. 219 (noted ante vol. 48, p. 258) and this decision was affirmed by the House of Lords (Lord Haldane, L.C., and Lords Halsbury, Ashbourne, Macnaghten, and Atkinson).

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

N.S.] DUNN *v.* EATON. [Oct. 29, 1912.

Appeal—Final judgment—Reference.

In an action claiming rescission of a contract for the sale of timber lands and other equitable relief and, in the alternative, damages for deceit, the trial judge held that it was a case for damages only and gave judgment accordingly and referred to a referee matters arising out of a counterclaim, ordering him also to take an account of moneys paid, an inquiry as to liens and incumbrances and as to the quantity of standing timber on the lands and other proper accounts. Further consideration of the cause was reserved. This judgment was affirmed by the full court and the defendants sought to appeal to the Supreme Court of Canada.

Held, that the action tried and determined was the common law action for deceit only; that the judgment given therein was not a final judgment within the meaning of that term in the Supreme Court Act; and that the court had no jurisdiction to entertain the appeal. *Clarke* v. *Goodall*, 44 S.C.R. 284, and *Crown Life* v. *Skinner*, 44 S.C.R. 616, followed.

Appeal dismissed with costs

Currey, K.C., for appellants. *Rogers*, K.C., for respondents.

Que.] TWO MOUNTAINS ELECTION CASE. [Oct. 29, 1912.

Dominion election—Nomination—Identification of candidate—Powers of Returning Officer.

The failure in the paper nominating a candidate for election to the House of Commons to identify him by addition, residence or description, is a substantial defect and the nomination should be rejected. DUFF and IDINGTON, JJ., dissenting.

The returning officer may reject such nomination after the

time for nominating candidates has expired, and may declare another whose papers are sufficient, elected by acclamation.

Appeal dismissed with costs, DUFF, J., dissenting.

Mignault, K.C., and *Atwater*, K.C., for appellant. *Perron*, K.C., and *Genest*, for respondent.

Ont.] HESSELTINE *v.* NELLES. [Dec. 10, 1912.

Appeal—Final judgment—Further directions—Master's report.

On the trial before the Chancellor of Ontario of an action claiming damages for breach of contract, judgment was given for the plaintiffs with a reference to the Master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The Master then made his report which, on appeal to the Chief Justice of the common pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment on further directions in favour of the plaintiffs for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor and the two appeals were, by order, heard together but not formally consolidated. Both judgments were affirmed by the Court of Appeal and the defendants sought to appeal from the judgment affirming them and also from the original judgment sustaining the decision at the trial having applied without success to the court below for an extension of time to appeal from the latter judgment; see *Nelles* v. *Hesseltine*, 27 O.L.R. 97.

Held, BRODEUR, J., dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chancellor could not review the original judgment of the Court of Appeal nor that varying the Master's report, and the Court of Appeal was equally unable to review them on the appeal from the Chancellor's decision; and the Supreme Court being able to give only the judgment that the Court of Appeal should have given, was likewise debarred from reviewing these earlier decisions.

Appeal dismissed with costs

Nesbitt, K.C., and *Matthew Wilson*, K.C., for appellants. *Holman*, K.C., for respondents.

Ont.] [Dec. 10, 1912.

KLINE *v.* DOMINION FIRE INS. CO.

Fire insurance—Removal of goods—Consent—Binder—Authority of agent.

Kline Bros. & Co., through the agents in New York of the respondent company, obtained insurance of a stock of tobacco in a certain building in Quincy, Flo., and afterwards obtained the consent of the company to its removal to another building. Later, again, they wished to return it to the original location and an insurance firm in New York was instructed to procure the necessary consent. This firm, on Jan. 14th, 1909, prepared a "binder," a temporary document intended to license the removal until formally authorized by the company, and took it to the firm which had been agents of respondents when the policy issued, but had then ceased to be such, where it was initialled by one of their clerks on his own responsibility entirely. On March 19th, 1909, the stock was destroyed by fire in the original location and shortly after a formal consent to its removal back was indorsed on the policy, the respondents then not knowing of the loss. In an action to recover the insurance:

Held, affirming the judgment of the Court of Appeal, 25 O.L.R. 534, that the "binder" was issued without authority; that even if the insurance firm by whose clerk it was initialled had been respondents' agents at the time, they had, under the terms of the policy, no authority to execute, and authority would not be presumed in favour of the insured as it might be in case of an original application for a policy; and that it was not ratified by the endorsement on the policy as the company could not ratify after the loss.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for appellants. *Hamilton Cassels,* K.C., for respondents.

N.B.] [Dec. 10, 1912.

GUIMOND *v.* FIDELITY-PHOENIX FIRE INS. CO.

Fire insurance—Insurance on lumber—Conditions—Warranty—Railway on lot—Security to bank—Chattel mortgage.

A policy insuring against loss by fire a quantity of sawn lumber in a specified location contained a warranty by the

assured "that no railway passes through the lot on which said lumber is piled, or within 200 feet."

Held, that a railway partly constructed and hauling freight through the said lot, though not authorized to run passenger cars and do general business, is a "railway" within the meaning of the warranty.

A condition of the policy was that if the subject of insurance be personal property, and be, or become encumbered by a chattel mortgage, it should be void.

Held, per DUFF, J. A security receipt under the Bank Act given to a bank for advances is not a chattel mortgage within the meaning of this condition.

Appeal dismissed with costs.

Hazen, K.C. and *F. Taylor,* for appellants. *Teed,* K.C. and *Fairweather,* for respondents.

N.S.] IN RE MCNUTT. [Dec. 13, 1912.

Habeas corpus—Supreme Court Act, s. 39(c)—Criminal charge —Prosecution under Provincial Act—Application for writ —Judge's order.

By sec. 39(*c*) of the Supreme Court Act an appeal is given "from the judgment in any case of procedings for or upon a writ of habeas corpus . . . not arising out of a criminal charge."

Held, per FITZPATRICK, C.J., and ANGLIN, JJ., that a trial and conviction for keeping liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, are procedings on a criminal charge and no appeal lies from the refusal of a writ of habeas corpus to discharge the accused from imprisonment on such conviction. DUFF, J., contra. BRODEUR, J., hesitante.

By the Liberty of the Subject Act of Nova Scotia on application to the court or a judge for a writ of habeas corpus an order may be made calling on the keeper of the gaol or prison to return to the court or judge whether or not the person named is detained therein with the day and cause of his detention.

Held, per IDINGTON and BRODEUR, JJ. that such order is not a proceding for or upon a writ of habeas corpus from which an appeal lies under said sec. 39(*c*). DUFF, J., contra.

Mr. JUSTICE DUFF, held that an appeal would lie in this case but that it must fail on the merits.

Appeal quashed without costs.

Power, K.C., and *Vernon,* for appellant. *Ralston,* contra.

Province of Ontario.

HIGH COURT OF JUSTICE.

Boyd, C., Latchford, and Middleton, JJ.] [Dec. 21, 1912.

CONNOR *v.* PRINCESS THEATRE.

Savage animal—Kept in yard adjoining theatre where performance given—Yard no part of theatre premises—Liability of proprietors of theatre.

The general rule of law is, that if a person, whether owner or not, harbours a dangerous animal, or allows it to be on and resort to his premises and such animal causes damage to another, the person harbouring the animal is liable to an action for the damages. See *McKone* v. *Wood* (1831), 5 C. & P. 1; *May* v. *Burdett*, (1846), 9 Q.B. 101 approved of in *Baker* v. *Snell* (1908), 2 K.B. at p. 355.

In this case it was sought to attach liability to managers of the theatre, where the owner of the monkey was engaged. The premises adjoining the theatre on which the monkey was when it bit the plaintiff's child was not the premises of the defendant, nor under their control. Neither the defendants nor the performers had a right to use the yard, therefore, the monkey could not be said to be harboured by the defendants, and no liability attached to them.

A. M. Lewis, for the plaintiff. *H. McKenna*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Graham, E.J.] [November 5, 1912.

MCGREGOR *v.* THE ST. CROIX LUMBER CO.

Company—Disposal of whole of undertaking—Agreement for, held ultra vires in absence of special resolution—Companies Act, R.S.N.S. 1900, *c.* 128, *amended by N.S. Acts*, 1912, *c.* 47—*Giving by legislature of express power prohibits deviation.*

Under the Nova Scotia Companies Act, R.S.N.S. c. 128, as amended by N.S. Acts of 1912, c. 47, a company, whether incor-

porated before or after the passage of the latter Act, may dispose of the whole of its undertaking. The sale referred to is not limited to sales for shares, debentures or securities of other companies carrying on a business of a similar character, but covers sales for money as well. Nevertheless, the procedure prescribed must be strictly followed.

An agreement entered into by the directors of a company for the sale of the undertaking to another company, although ratified by a resolution passed at a meeting of shareholders, is ultra vires and cannot be enforced in the absence of the special resolution called for by the amending Act, s. 5, as defined by s. 93 of the Companies Act.

Where the legislature gives a company express power, within certain limits, to do a special thing it is to be taken primâ facie to prohibit by implication any deviation from the power so given.

Mellish, K.C., *Burchell*, K.C., and *J. L. Ralston*, for plaintiff. *Rogers*, K.C., and *J. M. Davidson*, for defendant.

Full Court.] [Feb. 5.

ATTORNEY GENERAL OF CANADA *v.* CITY OF SYDNEY.

Militia Act, 1886 —*R.S.C.* 1886, *c.* 41, *s.* 34—*Militia called out in aid of civil power in case of riot—Claim against municipality—Statutory liability—Construction of statute—Words "senior officer," "locality," "district."*

Where a liability imposed upon a municipality is purely statutory a substantial compliance with the requirements of the statute which alone creates the liability is essential to the existence of the liability.

The Act respecting the militia and defence of Canada, R.S.C. (1886) c. 41, s. 34 made provision for the calling out of the active militia in aid of the civil power in any case in which a riot or other emergency requiring such service occurred or was anticipated as likely to occur, etc. And, further, "the senior officer of the active militia present at any locality shall call out the same or such portion thereof as he considers necessary, etc."

The militia having been called out by the officer in command of military district No. 9, in pursuance of a requisition addressed to him for that purpose.

Held, 1. The words "senior officer of the active militia present at any locality" mean the senior officer at or nearest the place where the riot has occurred or is anticipated and not the senior officer of the district.

2. Where two such words as district and locality occur in the same statute it is a safe, though not an inflexible rule, that they should not be construed as meaning the same thing.

3. A subsequent statute is of assistance in construing a previous statute on the same subject.

F. McDonald, K.C., for defendant, appellant. *Macilreith,* K.C., for plaintiff, respondent.

Book Reviews.

The Law of Torts. By J. F. CLERK and W. H. B. LINDSELL. Sixth edition by WYATT PAINE, Barrister-at-law, London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1912. 1018 pages.

This edition has been published as a companion volume to the latest edition of Chitty on Contracts, the combined treatise forming a compendious statement of the various legal obligations arising ex delicto or ex contractu.

This is a great law book. It is not surprising, therefore, that in three years a new edition has been called for, and it is fortunate for the profession, as well as for the publishers, that a legal writer of such marked ability as Mr. Wyatt Paine was selected to do the editing. The field of law this treatise covers is a very wide one; and, owing to the rapid and continuous changes in the business life of to-day and the innumerable developments in matters of transportation, manufacturing of mechanical and scientific appliances, varied trade relations and legislation, the law varies from day to day, and the litigation which thus arises decides new problems of right and wrong. All this has added to the labour of the editor and necessarily increased the size of the volume.

This book is so well and so favourably known to the profession that it needs no commendation from us. The publisher's part of the work has been done in their usual excellent style.

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HARBOURING DANGEROUS ANIMALS.

A case of *Connor* v. *Princess Theatre,* (ante p. 118) came before the Divisional Court on an appeal from the County Court of Wentworth in which the plaintiff sought to recover damages for being bitten by a performing monkey in the following circumstances. The defendants, the proprietors of a theatre engaged a person to give an exhibition with a performing monkey at the defendants' theatre. Adjoining the theatre was a restaurant having a backyard into which there was access from the theatre; but the yard belonged to the owner of the restaurant, and the defendants were merely permitted to have access thereto, and occasionally placed property thereon belonging to them. The owner of the monkey, without any license or authority from the defendants fettered the monkey to the leg of a table in this yard and the plaintiff who was living at the restaurant, going into the yard, as he had a right to do, was bitten by the monkey. The action was dismissed by the County Court judge and the Divisional Court (The Chancellor, Latchford, and Middleton, JJ.), affirmed the decision, on the ground that the monkey was not in any way harboured by the defendants, nor on their premises, nor under their control, except during the time of the performances in the theatre. Of the correctness of this conclusion there can, we think, be no reasonable doubt.

If the action had been against the owner of the restaurant it would probably have succeeded: see *Shaw* v. *McCreary,* 19 Ont. 39, because a person who permits a wild animal (ferœ naturœ) to be harboured on his premises, does so at the risk of being liable for any damage it may do. But this rule, as the

Chancellor points out, is subject to modification in regard to animals which, though ferœ naturæ in their savage state, have, by long domestication become tamed and made gentle in their behaviour to mankind. Of this the recent case of *Clinton* v. *Lyons* (1912), 3 K.B. 198, is an instance, where the owner of a cat which bit a customer on his premises was held to be free from liability, for the sudden and unlooked for vicious act, and so it is with dogs, horses, cattle and other domestic animals which are not known to be vicious, but which suddenly and unexpectedly develop vice.

All animals, were, of course, originally wild, and more or less savage, but some have, by long domestication, become ordinarily gentle, and inoffensive to mankind; such as horses, bulls, cows, rams, sheep, pigs, cats, and dogs. The keeping of such animals, not actually known to be vicious entails no liability at common law for any sudden and unlooked-for outbreak of viciousness, whereby injury is caused to another; but by statute (2 Geo. V. c. 65, Ont.), an exception is made in the case of dogs killing or injuring sheep, the owner of the dog being liable for such injury whether he knew the dog was vicious and accustomed to worry sheep or not.

But animals which are not usually domesticated and are ordinarily wild and savage stand on a different footing, and can only be kept or harboured at the peril of the person so keeping or harbouring them, having to be answerable for any damage which they may do, even though such an animal may have been tamed and be ordinarily quiet and inoffensive; therefore he who keeps an elephant: *Filburn* v. *Peoples' Palace Co.*, 25 Q.B.D. 258; or a monkey: *May* v. *Burdett* (1846), 9 Q.B. 101; a bear: *Shaw* v. *McCreary*, 19 Ont. 39; *Besozzi* v. *Harris*, 1 F. & F. 72, or animals of a like nature must keep them secure, and incapable of doing injury to others, and whether the owner knows of their dangerous disposition or not, is immaterial, he is liable at common law for all damage which they may do; unless the person injured be so injured while a trespasser; thus where the owner of zebras kept them securely tied up in his stable but

the plaintiff went into the stable without leave or license to stroke them and got injured it was held the owner was not liable: *Malor* v. *Ball* (1900), 16 T.L.R. 239. In *Brock* v. *Copeland*, 1 Esp. 203, it was held by Lord Kenyon, that every man has a right to keep a dog for the protection of his premises and that a person coming on the premises after dark and being bitten by a dog so kept has no right of action.

In *Irving* v. *Walker* (1911), A.C. 10, a horse known to be savage was left untethered in a field through which it was known to the owner that the public were accustomed to pass, and it was held that the owner was liable for injury done thereby to the plaintiff passing through the field; and though the courts below thought that the fact that the plaintiff was a trespasser exonerated the defendant from liability: see *Marlor* v. *Ball* (1900), 16 T.L.R. 239, yet the House of Lords considered that the defendant, knowing of the habit of people passing through the field, though without license, was guilty of a wrongful act in exposing them to the attack of a known vicious animal; and see *Brock* v. *Copeland* (1794), 1 Es. p. 203, where it was also said if the person injured was on the premises under colour of right, though contested, he might maintain an action, but a mere trespasser who is bitten by a dog on the owner's premises has no right of action: *Sarch* v. *Blackburn*, M. & M. 505; 4 Car. & P. 297, and see *Brock* v. *Copeland, supra.*

While, therefore, a knowledge of the dangerous character of ordinary domestic animals is necessary (except in case of dogs injuring or killing sheep) in order to make the owner liable for the injury they may do; such knowledge is not necessary in the case of animals which are not domestic, but are usually wild —even though such an animal may have been tamed and rendered ordinarily inoffensive to mankind: *Besizzi* v. *Harris*, 1 F. & F. 92.

Where it is necessary to prove knowledge, the fact that the defendant had admitted that his animal had done the injury complained of and offered $10 in compensation was held to be admissible evidence of knowledge to be submitted to a jury, but

with a caution as to its weight: *Mason* v. *Morgan,* 24 U.C.Q.B. 328; *Thomas* v. *Morgan,* 2 Cr. M. & R. 496. A knowledge that a bull would run at anything red, was held to be evidence of knowledge of the dangerous character of the bull, which had attacked the plaintiff wearing a red necktie: *Hudson* v. *Roberts* (1851), 6 Ex. 697. But the mere knowledge that a dog was a fierce one is not sufficient, in the absence of any evidence that he had ever bitten anyone, *per* Lord Ellenborough, in *Beck* v. *Dyson* (1815), 4 Campb. 198, but a knowledge that a dog had the habit of rushing at people, and attempting to bite them, though it may not have actually bitten anyone, was held to be evidence of knowledge of its dangerous character: *Worth* v. *Gilbing* (1866), L.R. 2 C.P. 1, but proof that the dog had a habit of bounding upon and seizing persons, not so as to hurt or injure them, though causing some annoyance and trivial damage to clothing, is not proof of knowledge of its being of a savage or ferocious disposition: *Love* v. *Taylor,* 3 F. & F. 731, and in that case the dog was allowed to be shewn to the jury. The knowledge need not be actually brought home to the owner himself, it is sufficient if his servant who has the charge of the animal has knowledge of its vicious propensities: *Baldwin* v. *Casilla,* L.R. 7 Ex. 325. Proof that the owner had warned a person to beware of the dog lest he should be bitten, was held to be proper to be submitted to a jury in support of the allegation that the dog in question was accustomed to bite mankind: *Judge* v. *Cox,* 1 Stark 285, 18 R.R. 769. Proof that a dog had bitten cattle is not evidence that the owner knew he would bite mankind: *Thomas* v. *Morgan,* 2 C. M. & R. 496.

But an owner of domestic animals may be liable for damage they do owing to his negligence, quite irrespective of any knowledge of their liability to do the injury in question; thus where the owner of two dogs fastened them together and let them run loose in the highway, and they rushed at the plaintiff, and threw him to the ground, and thereby broke his leg, it was held that the owner was liable: *Jones* v. *Owen,* 24 L.T. 587. See also *Baker* v. *Snell,* 1908, 2 K.B. 352, 825, and the comment on that case, ante vol. 45, p. 357.

If the owner of a dog keeps him properly secured, but another person improperly lets him loose and urges him to mischief, the owner is not liable: *Fleming* v. *Orr,* 2 Macq. H.L. Cas. 14, and the owner of a horse which strayed on to a highway, and, without any apparent reason, there kicked a child, was held not to be liable in the absence of evidence that he knew the horse was likely to commit such an act: *Cox* v. *Burbidge,* 13 C.B. (N.S.), 430.

The harbourer, though he be not the owner, of a known vicious animal is liable for the injury it does: *Vaughan* v. *Wood,* 18 S.C.R. 703.

A recent ruling of Mr. Justice Darling at the Central Criminal Court as to the distinction between murder and manslaughter has raised some comment in the profession. A woman charged with the wilful murder of another woman by shooting her raised the defence that, having received great provocation from her husband and the woman, she intended to shoot him and herself, but by mistake shot the other woman. It was contended on her behalf, and the learned judge charged the jury to the same effect, that such facts, if proved, might amount only to manslaughter if the husband were killed, and might justify a verdict of manslaughter in the case in question. The tendency of the courts to narrow, rather than to enlarge, the cases which come within the category of "constructive" murder is well known, but the old rule still obtains that if a person, whilst doing or attempting to do another act, undesignedly kills another person, if the act amounted to felony, the killing is murder; if merely unlawful, manslaughter. Manslaughter is a felony, and it seems somewhat difficult to reconcile the above ruling with the old-established rule of law.—*Law Times.*

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

By The Honourable Mr. Justice Riddell, L.H.D., LL.D.

(*Third Paper.*)

It is now proper to speak of Mr. Justice Willis. John Walpole Willis was an Englishman of good family, but not much money. He was the son of (Rev.) Dr. Willis, who with his son, also a Dr. Willis, took charge of King George III. during his periods of mental aberration. Willis became a barrister and devoted himself chiefly to equity, writing several books which display both ability and learning. He married Mary, the daughter of the Earl of Strathmore, a client of his; and the bride had not much more money than the groom.

About 1827, the project was in the air to establish a Court of Chancery in Upper Canada to "mitigate the rigour of the common law," a project which was held in more favour at Westminster, England, than at York, Upper Canada. Willis no doubt was led to believe that this Court would soon be created; and he accepted an appointment as puisne justice of the Court of King's Bench in the meantime, expecting to be made Chancellor at no very distant date.

As we have seen, he was sworn in on Nov. 5, 1827, succeeding Mr. Justice Boulton. He soon found that neither the Lieutenant-Governor (Sir Peregrine Maitland) nor the Attorney-General (John Beverley Robinson) was favourable to the formation of a Court of Equity at that time in the colony. There was trouble, too, when his wife arrived, over the relative rank and precedence of the daughter of the Earl of Strathmore and the wife of the Lieutenant-Governor, the beautiful Lady Sarah Lennox. Willis, moreover, had his fair share of the traditional and proverbial sentiment of superiority felt by the new-come-out Englishman over the "Colonial." He entertained some contempt for the Chief Justice and his colleague, and did not hesitate to express it. Considering himself wronged by the official class, he rather affected the opposition, or Radical, element. The

"hope deferred which maketh the heart sick" he felt in no small measure; and he was led to do some very unwise acts. At a somewhat early stage in his judicial career, he exhibited his want of judgment—I had almost said of common sense and common decency.*

George Rolph, who is described by Mackenzie as "an English Barrister†, and who was called to the Bar of Upper Canada, Trinity Term, 2 George IV., 1821, was practising in Dundas: he

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*Dent in his "Story of the Upper Canadian Rebellion," vol. 1. p. 168, says that the judgment of Mr. Jutsice Willis in *Rolph* v. *Simons et al.* was the "very first judgment ever rendered by him." This is an error; in addition to what appears in the official Term Books we have the following statement in Willis' Narrative: "On the 19th of November (1827), the last day of Michaelmas term, judgment was given in two cases; in the first I differed with both my brother judges." And he shews that it was an action for malicious prosecution brought by a tailor against an employer who had prosecuted him for theft, and adds, "this was the first in which I gave any judgment that was not quite of course." In the other case the two puisne justices, Sherwood and Willis, were of the same opinion, but the Chief Justice (Campbell), dissented.

Dent is equally in error in saying "no hint of partiality had ever been heard against him. There had been no opportunity for any display of partiality by him, for he then took his seat upon the Bench for the first time." He had in May, 1828, been upon the Bench for two full terms, he had had on April 11th an open dispute with the Attorney-General, charging him with neglect of duty in not prosecuting those who had destroyed Mackenzie's press—and generally had shewn himself not well disposed to the Government. Public comment was not wanting.

Dent's mistake probably arose from a misapprehension of a passage in Lieutenant-Governor Sir Peregrine Maitland's dispatch to the Colonial Secretary of June 6th, 1828. He says: "In the first cause ever tried by him he began an excitement to which our Courts of Justice have never before given occasion, by proceedings which have been already referred to your consideration."

The Lieutenant-Governor is apparently, by Dent, supposed to be referring to the case of *Rolph* v. *Simons et al.*, but such is not the fact. What he refers to is the first time Willis ever presided in a trial court, civil or criminal, in Upper Canada or elsewhere, which was April 11th, 1828, when Patrick Collins, editor of the *Canadian Freeman*, was to be tried for libel. On this occasion Willis allowed Collins to make a vicious attack upon the Attorney-General, and himself went out of his way to administer a rebuke to that officer wholly undeserved and effectively resented on the spot.

†George Rolph was not an English Barrister, as Mackenzie thought. Dr. Rolph was called to the Bar of Upper Canada upon his standing as a member of the Inner Temple, in Michaelmas Term, 2nd George IV.; but George was admitted on the books of the Law Society as a student-at-law, Saturday the last day of Trinity Term, 56 George III., 1816, as being under articles of clerkship, and he was called Saturday the 6th day of Trinity Term, 2 George IV., 1821, having proved his service for five years as a student-at-law in Upper Canada.

was a brother of the more celebrated Dr. John Rolph. One night in June, 1826, a number of persons broke into his house, with their faces blackened and otherwise disguised, and took Rolph out of the house and tarred and feathered him. He brought an action against Titus Geer Simons, (Dr.) James Hamilton and Alexander Robertson for assault and battery. The action was tried at the assizes for the Gore District, Saturday, 25th August, 1827, before Mr. Justice Macaulay and a jury.‡ The judge's note-book is still extant and gives a full account of the shameful affair. Dent says ("The Upper Canadian Rebellion," vol. 1, p. 168), that "the outrage arose out of private complications and no political question arose in the course of the trial." But no one who is acquainted with the political situation of the time and the personnel of the parties, can read the judge's notes without seeing that the outrage was very largely political. Perhaps the assailants justified themselves to their own minds and consciences, but it is notorious that a sin in a political opponent seems blacker than in any other. It was, at the trial, proved that the gang had blackened their faces at Dr. Hamilton's, that tar was taken from near there, and generally it was sufficiently shewn that Simons and Hamilton had been ringleaders of the mob.

Andrew Stevens, who had been subpœnaed, was called as a witness by the plaintiff, "he declines being sworn, says he can answer no questions but may criminate himself. After argument," the judge says: "I think him competent and that he is bound to be sworn, but not to answer questions that will implicate himself criminally. He refuses to be sworn. Were it a criminal case the refusal is a contempt for which he might be committed; in a civil case, I consider it a contempt also, the witness having appeared in court, but as the refusal may be tantamount to a disobedience of the subpœna, I will not commit him, the party having a remedy in case I should be wrong; but

‡James Buchanan Macaulay who became a justice of the King's Bench in 1829, Chief Justice of the Court of Common Pleas in 1849, and who was afterwards in 1857 knighted, had been 3rd July, 1827, appointed temporary Justice of the King's Bench in the room of Hon. D'Arcy Boulton.

if I ought to commit him till he is sworn, the verdict may be set aside for breach of duty by the judge. Witness refuses to be sworn; Mr. Stevens seemed to want to be sworn in a qualified way, and not to receive the general oath, but knowing of no such precedent, I did not permit it. I think he should be sworn generally and the court should protect him under his privilege not to implicate himself criminally. But the witness refused to be sworn." George Gurnett took the same objection. "I explained to him my opinion of the law—of his rights and duty and of his privilege when a witness, but not from being a witness. There is no proof of his being an accomplice further than he himself states; taken for granted." Dr. Baldwin in his argument in term says Gurnett "impudently addressed" the judge as follows: "My Lord, I have a duty to perform superior to and independent of all personal considerations, which makes it impossible for me to give evidence upon this trial"—but the judge's notes do not set this out. Allan N. McNab, an attorney of the court and of counsel for the defendants, took the same objection. "Means to say that he can give no evidence that has not a tendency to implicate himself criminally."

The attorney for the defendants, Mr. Chewett, was also called and took the same position; none of the last named three had been subpœnaed. None of these witnesses was sworn or committed, as it was argued they should have been. There were four witnesses for the defence, and the jury found against Col. Simons and Dr. Hamilton, assessing damages at £40 ($160.00), and acquitted Robertson. The plaintiff was not satisfied with the result, but moved in term. The following is the official record:—

"Michaelmas Term, 8 George IV., Nov. 9, 1827 (Praes. Campbell, C.J., Sherwood and Willis, JJ.): *Rolph* v. *Titus G. Simons, James Hamilton and Alexander Robertson.* Motion for a rule to shew cause why the verdict rendered in this cause at the last assizes in the district of Gore should not be set aside and a new trial granted, the plaintiff having lost important testimony from the contumacy of certain witnesses in refusing to be sworn when required so to be by the learned judge who

tried the cause, and having been refused the reply. Robt. Baldwin, Esq., for plt. Granted and issued."

(Praes. Campbell, C.J., Sherwood and Willis, JJ.), Nov. 17. "Rule enlarged."

The Chief Justice (Campbell) went to England on leave of absence, leaving Sherwood and Willis alone as justices of the court. The commission of Macaulay, of course, lapsed when Willis was appointed in Boulton's place.

The case came on for final argument in Easter Term, May 1828, before these two judges; the Solicitor-General, Henry John Boulton, against the motion, Dr. Baldwin and his son Robert Baldwin for it. The object of the new trial was stated to be two-fold: (1) A verdict against Robertson and (2) an increase in the amount of damages awarded. Neither judge attached any importance to the second ground of appeal, viz., that the plaintiff had been refused the right of reply—and they differed as to the other ground, Mr. Justice Sherwood holding that there was no breach of duty in the trial judge not committing Stevens, that either the Court in Term should do so or the plaintiff might bring an action against him. As to the other three witnesses he held that as they were not subpœnaed they could not be compelled to give evidence even if present in court. He concluded that the plaintiff should have taken a nonsuit, and that as he did not, but took a verdict against two defendants, he could have a new trial.

Mr. Justice Willis held that McNab and Chewett were in contempt, Stevens also contumacious, whatever might be said as to Gurnett, inclining to the opinion, however, that he was in the same case as Stevens. He considered that there should be a new trial. He rebuked the Solicitor-General for taking the brief for the defendants instead of prosecuting them criminally, as was his duty—a rebuke instantly resented and replied to with much spirit and asperity by the Solicitor-General, who defended his conduct with vigour and point.

In the course of his judgment Willis said: "In forming my opinion of this cause, which I have now given at very consider-

able length, I have viewed the case, as I hope I shall do every case that comes before me, solely with reference to its intrinsic merits. Totally devoid of all personal, all party and all political feeling, it has been and ever will be my earnest desire to render to every one impartial justice;" and winds up by quoting Horace Odes, Bk. 3, Carm. 3:—

> "Justum ac tenacem propositi virum
> Non civium ardor prava jubentium
> Non vultus instantis tyranni
> Mente quatit solida . . ."

of which he gives a translation for the benefit of the vulgar:—

> "The Man, in conscious virtue bold
> Who dares his honest purpose hold
> Unshaken hears the crowd's tumulutous cries
> And the stern tyrant's brow in utmost rage *defies.*"

However admirable these sentiments in the abstract may be and are, this was a most injudicious method of speech, plainly suggesting as it did, that other judges acted from political motives or through fear of the Governor. But the Radical papers took up the newcomer and extolled his sentiment—largely, one may be permitted to conjecture, that they might thus harass the Government of the day.

Mr. Justice Willis, when he could not get his Court of Equity through the Government, himself drew up a bill and endeavoured to have it passed through the agency of the opposition. Chief Justice Campbell was in poor health and was known to be about to retire, and Willis applied for the Chief Justiceship; but Attorney-General Robinson also desired the position, and had the better claim to it. Willis fell out with the Attorney-General and charged him officially with neglect of duty. Complaint was made against Willis to the home authorities; while he on the other part seems to have acted in everything in such a way as most to irritate the Government. He had, or affected to have, the most profound contempt for the legal attainments of his colleagues, especially Mr. Justice Sherwood, and when the Chief Justice, as we have seen, left for England on leave of absence, which he did after Hilary Term, 1828, the court, composed of two puisnes, was the scene of continual and unseemly

wrangling. At the beginning of Trinity Term he announced that the court was not properly constituted, as the Act, 34 George III., c. 2, required three judges, and he declined to sit in Term, leaving to Mr. Justice Sherwood the whole work of the full court. He then left for England to lay his wrongs before the home authorities. It is to be remembered that from the very beginning, the Court of King's Bench in Term was frequently composed of only two judges, and sometimes only one. Take what occurred at the very first. The court was instituted in 1794 by 34 George III., c. 1, of three judges. William Osgoode, the first Chief Justice, never sat in the King's Bench in Term; up to Hilary Term, 37 George III., Jan. 16, 1797. William Dummer Powell, the puisne judge, sat occasionally alone, but usually with Hon. Peter Russell, who had a special commission. At length (Jan. 16, 1797), John Elmsley presented his patent as Chief Justice and was sworn in. Peter Russell also presented his patent as one of the justices for that term, and he also was sworn in. The ceremony is described in detail in the Term Book and the description is copied in Read's "Lives of the Judges," p. 44. Russell was appointed also for Easter Term, 1797, for Trinity Term, 1797; and these two, i.e., Elmsley and Russell sat for these terms. Powell, J., came back in Michaelmas Term, 38 George III., November 6, 1798, and sat with the Chief Justice thereafter. Willis had himself, the first term he was judge, sat with Sherwood, J., to make a full Court in two days of the term, and the next term for more, while the two formed the Court for the whole Easter Term, 1828.‖

The Lieutenant-Governor removed Willis; "Amoved" is the term invariably used in our records. The Privy Council decided Willis was wrong in his law. He was appointed judge at Demerara and afterwards at New South Wales. He had trouble

‖From a list made up June 19th, 1828 by Mr. James E. Small, Deputy Clerk of the Crown, for the information of the Executive Council, it appears that up to that time out of the 135 terms of the Court of King's Bench, 56 only had been held by the Chief Justice and two puisne judges; that 59 terms had been held by a Chief Justice and one puisne judge; that 15 had been held by two puisne judges and 5 by one puisne judge alone.

with the Governor there and was again amoved; this time, however, irregularly, and the Privy Council allowed his appeal (1846, *Willis* v. *Gipps*, 5 Moo. P.C. 379). But he was forthwith regularly removed and failed to obtain further employment. He died in 1877.

The statement of the Lord Chancellor (Lord Lyndhurst) at p. 388 of the report in 5 Moore that on the previous occasion "the order on a motion then appealed from was set aside because the appellant was not heard in Canada" is an error. Sir George Murray said in his place in Parliament, May 11th, 1830, when the matter was brought up by Lord Milton on the occasion of Willis petitioning for redress on the ground that he had acted in good faith: "The Government had taken the expense (of an appeal to the Privy Council) on itself. The case was argued before the Privy Council . . . Mr. Willis' complaint amounted to this, that his removal was unwarranted, illegal and ought to be void; and the decision of the council was that it was not unwarranted, not illegal and that it ought not to be void.§

There has been only one other instance of amoval of a judge of a Superior Court in Upper Canada (Ontario)—that of Mr. Justice Thorpe in 1807. Other troubles of Mr. Justice Willis may be seen in the report of *Willis* v. *Bernard*, 5 C. & P. 342; 8 Bing. 376. His wife, left behind in Canada, consoled herself with Lieutenant Bernard; and the injured husband brought a successful action of crim. con.

When Willis, J., refused to sit, Dr. W. W. Baldwin, his son Robert Baldwin, Dr. John Rolph and Simon Washburn declined to act as counsel before the court. But when the decision of the Privy Council became known, they all returned to the court except Dr. Rolph, who never again appeared in term, and shortly afterwards sold out his practice to his brother in Dundas.

We have gone far away from *Rolph* v. *Simons et al.*, but the result was such that Mackenzie was almost justified in saying in 1832 in his "Sketches of Canada and the United States," p.

§Hansard's Parliamentary Debates, New Series, vol. 24, pp. 551 et seq. (1830).

400: "Mr. Rolph . . . had been tarred and feathered a few years before by some of the Government officers . . . but the law in Canada could yield him no redress, although a lawyer, and his brother, one of the most popular and estimable men in the colony." It may have been A. N. McNab's success in disobeying the judge at this trial which emboldened him in 1829 to defy a committee of the assembly, refuse to answer their questions and aggravate his offence by the terms of his written defence. This conduct landed him in custody for ten days, but was the begining of a prosperous career as a politician, culminating in the premiership of Canada and a knighthood. George Rolph seconded the motion for committing him to the gaol at York for contempt. "Time brings about its revenges."

WILLIAM RENWICK RIDDELL.

REVOLVERS.

The habit of carrying revolvers, and the consequent readiness to use them is a serious menace to the peace and good order of the country. The revolver is a deadly and powerful weapon. Unlike other fire-arms it can be easily carried, easily concealed, and easily made use of. Unlike other fire-arms its chief, indeed, almost its only use is for mischief. For defence it is practically useless. For acts of violence it is ready at any moment, and requires no preparation to make it available. It is the chosen tool of the assassin, the burglar, and the footpad. By its use, even as a threat, most daring and successful robberies have been committed. It is not safe even in the hands of the police, and should only be entrusted to men of proved discretion, and only for use in cases of extreme necessity. The possession of so handy a weapon is of itself a temptation to use it upon the slightest provocation. Where a blow of the fist, or of a cudgel, would, in former times, have been used to punish an injury, or requite an insult, a shot from the hidden revolver is now the method approved, and accepted as a matter

of course. The daily papers are full of such incidents. Lately, in one paper, were recorded two typical specimens. In one case a man in a fit of jealously went into a room where his wife was and shot her dead. In the other a policeman, finding himself unable to catch a man who, for some trifling depredation he wished to arrest, fired off his revolver, thinking thereby, if he thought at all, to frighten the thief and compel him to stop. The bullet, however, though sent forth aimlessly, found its billet with fatal effect in the person of an innocent bystander.

Such things happening, and happening frequently, prove that the mere possession of the weapon is an inducement to use it. The carrying of such weapons is unlawful, but how often is the law put in force? Some more stringent measures should be adopted to change this growing evil, and one so difficult to deal with.

The sale of poisons is carefully guarded; the sale of revolvers should be equally looked after. No ordinary person needs, or should possess, a revolver any more than he should have, or carry about him a bottle of prussic acid, arsenic, or other deadly drug.

Public opinion should be roused on this subject, and directed to the evils of the habit and its more evil consequences. In this way, more effectually perhaps, than in any other, the mischief may be dealt with. We earnestly commend this subject to the consideration of the police authorities and the law officers of the Crown.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

COMPANY — DEBENTURES — JEOPARDY OF ASSETS—TRUST DEED —POWER OF MODIFICATION — DEBENTURES PAYABLE PARI PASSU—RESOLUTION SANCTIONING SALE OF COMPANY'S ASSETS, AND DIVISION AMONGST DEBENTURE HOLDERS ACCEPTING LOWEST PRICE.

In re New York Taxicab Co., Sequin v. *The Company* (1913) 1 Ch. 1. This was an action by a debenture holder of the defendant company on behalf of himself and all other debenture holders for a receiver and an injunction restraining the defendants from carrying out a resolution altering or purporting to alter the provisions of the trust deed securing the debentures. The company was not being pressed or threatened by outside creditors, and there was no risk of its assets being seized on their behalf, but the security of the debenture holders was inadequate, but this, Eady, J., held was not a sufficient reason for appointing a receiver as asked. The trust deed in question provided that the debentures were to be paid pari passu; but it provided that the provisions of the trust deed might be modified by a resolution passed by three-fourths majority of the debentures at a general meeting. At such a meeting the required majority had passed a resolution sanctioning a sale of all the company's assets and a division of the proceeds, not among all the debenture holders rateably, but amongst those willing to accept the lowest price for their debentures. This resolution, Eady, J., held was not such a modification of the trust deed as the majority were competent to make and he granted an injunction against it being acted on by the company.

MARRIAGE SETTLEMENT—AFTER ACQUIRED PROPERTY—COVENANT TO SETTLE—ACQUISITION OF PROPERTY—EFFECT OF COVENANT IN EQUITY—PAYMENT OF AFTER ACQUIRED FUND TO HUSBAND—REMEDY OF TRUSTEES—LAPSE OF TIME—STATUTE OF LIMITATIONS.

Pullan v. *Koe* (1913) 1 Ch. 9. This was an action by the trustees of a marriage settlement to enforce a covenant to settle after acquired property. The settlement was made in 1859 and contained the usual covenant by the husband and wife to settle

the wife's after acquired property. In 1879, the wife received £285 which was bound by the covenant, and paid it into her husband's banking account on which she had power to draw. Part of the money was invested in two bonds payable to bearer, which remained at the bank until the husband's death in 1909, and were now in his executor's possession. The action was brought against the executors, claiming the two bonds as bound by the settlement and subject to the trusts thereof. Eady, J., who tried the action held that the money being bound by the covenant when received by the wife, was consequently subject to a trust enforceable in favour of all persons within the marriage consideration, and notwithstanding the lapse of time the trustees were entitled to follow and claim the bonds as trust property, though the legal remedy on the covenant was barred by the Statute of Limitations. The court therefore declared that the plaintiffs were entitled to the two bonds and the interest which had accrued thereon since the husband's death.

SETTLEMENT—TENANT FOR LIFE AND REMAINDERMAN—SHARES IN COMPANY—CAPITALIZATION OF RESERVE FUND—OPTION TO TAKE NEW SHARES—NEW SHARES—CAPITAL OR INCOME.

In re Evans, Jones v. *Evans* (1913) 1 Ch. 23. This was a contest between a tenant for life and remainderman as to the right to certain new shares in a company acquired in the following circumstances. Trustees of a testator's will held 200 shares of £10 each in a limited company. The testator died in 1904, In 1912, the reserve fund of the company exceeded £50,000 and the directors proposed a scheme for distributing a part of this reserve representing accumulated and undivided profits, amongst the shareholders, so that every shareholder would get a bonus of one new, fully paid £10 share for every existing share held by him. Accordingly resolutions were passed by the company empowering the directors to declare a bonus dividend out of the reserve fund sanctioning distribution of a bonus dividend of £10 per share out of the reserve fund; and authorizing the issue and allotment of new shares fully paid up pro rata among the shareholders. The directors then sent a circular letter to each shareholder with a warrant for the bonus dividend, informing him of the allotment of the new shares and giving him an option to accept or refuse the allotment, and stating that if he accepted he was to indorse and return the dividend warrant to the com-

pany. The trustees on receipt of the notice accepted the allotment and indorsed and returned the dividend warrant to the company. They subsequently sold the shares at a profit. The question then arose between the tenant for life of the original shares and the remainderman, whether the new shares thus acquired were to be regarded as capital or income. Neville, J., held that the result of the evidence was that the company intended to capitalize its reserve fund, and not to distribute it as a bonus dividend, and therefore, though the form of the transaction was the payment of a bonus dividend and a payment of it back to the company for the new shares, it was nevertheless merely a scheme to carry out the real intention of the company, which was to capitalize and not distribute the reserve fund.

SETTLEMENT—LIFE INTEREST SUBJECT TO BE DIRECTED BY ASSIGNMENT — ADVANCEMENT CLAUSE — APPOINTED SHARES — RELEASE OF LIFE INTEREST IN ADVANCES—FORFEITURE.

In re Hodgson, Weston v. *Hodgson* (1913) 1 Ch. 34. Two questions are discussed in this case arising under a marriage settlement—whereby the husband and wife's property were vested in trust to pay the wife £150 per annum and the residue of the income to the husband for life, subject to forfeiture if he assigned, charged or incumbered the same or any part. The settlement provided for advancement to the children of the marriage and after the termination of the husband's life estate the trust estate was to be held by the trustees for the children, in such shares as the husband and wife by deed should appoint and in default of appointment for them equally at twenty-one or marriage. The husband and wife appointed in favour of two sons respectively, each one ninth part of the fund, and at their request sums were raised by way of advancement for two daughters in which sums the husband released his life interest—One of the questions raised was whether the shares appointed were to be regarded as advancements; and Neville, J., decided that they were, and that they were within the advancement clauses of the settlement. The other question was whether the husband, by releasing his life interest in the moneys advanced, had forfeited his life interest in the rest of the funds; and Neville, J., held that he had not, because his release of his interest in the sums advanced was something done in accordance with and for the purpose of carrying out the advancement clause of the settlement.

REVENUE—INCOME TAX—COLLECTION OF TAX—RESOLUTION OF COMMITTEE OF HOUSE OF COMMONS—STATUTE.

Bowles v. *Bank of England* (1913) 1 Ch. 57, involved a point of constitutional law and is therefore deserving of attention. By resolution of the House of Commons committee of ways and means, an income tax at a certain rate for the ensuing financial year was assented to. Before any statute had been passed giving effect to the resolution, the Bank of England had assumed to deduct the income tax at the rate agreed to, from dividends payable by the bank to the plaintiff. Parker, J.,, held that the bank had no right to do this without the assent of the plaintiff, and that the Crown had no right to collect a tax until it has been duly imposed by Act of Parliament.

COMPANY—LIQUIDATION—CLAIM AGAINST FIRM OF PROMOTERS FOR SECRET PROFIT—LIABILITY OF PARTNERS—JOINT AND SEVERAL LIABILITY.

In re Kent County Gas Co. L. & E. Co. (1913) 1 Ch. 92. In this case, the company was promoted by a firm of F. C. Lawson & Co., of which Gyde and Darby were the sole partners—The firm sold a business to the company, and made a secret profit out of the transaction. The company went into compulsory liquidation. Both Gyde and Darby were bankrupt: Gyde had no assets. The liquidator of the gas company proved against Hyde's estate a claim for the secret profit and received from his estate a dividend of 3s. in the pound, amounting to £2109. Out of this money and other assets the liquidator was prepared to pay the preference shareholders part of their capital. Two preference shareholders were mere nominees of Lawson & Co. The liquidator claimed, in these circumstances, to retain the dividends payable to these nominees of Lawson & Co. and set them off pro tanto against the amount due from Lawson & Co. to the company in respect of their secret profit; but Neville, J., was of the opinion as the company had elected to prove against the separate estate of Darby, its right to prove against the firm was gone, as the liability did not arise on separate contracts of the firm, and the partner, but was a liability of the firm; and therefore the election to prove against the separate estate of one of the partners there being no double liability, put an end to the right to sue the firm and consequently that the liquidator had no right to set off the dividends due

the firm's nominees as proposed. This may be law, but it does not appear to be satisfactory, inasmuch as it enables the fraudulent firm to participate in the damages recovered from one of its members in respect of its fraud.

LANDLORD AND TENANT—COVENANT TO REPAIR—WASTE—RIGHT TO DAMAGES FOR WASTE—UNASSIGNABILITY OF RIGHT—IMPLIED COVENANT BY TENANT NOT TO COMMIT WASTE.

Defries v. *Milne* (1913) 1 Ch. 98. In this case the plaintiff was trustee of a lease for a company and the company as the beneficial tenant of the premises agreed to sell the plant and machinery and tenant's fixtures on the demised premises, and for the purpose of enabling the purchaser to remove the property purchased by him, he was authorized by the company to occupy the premises for a specified period upon condition (inter alia) that he was not to do anything which if done by the lessee would be a breach of the covenants and conditions contained in the lease (which contained the usual covenants by the lessee to repair). It was also provided that the purchaser was to make good to the satisfaction of the lessor all damage done in removing fixtures. Whilst in possession the purchaser did certain acts alleged to constitute waste. Upon the purchaser going out of possession on 29 September, 1911, the plaintiff was let into possession and by deed dated November 6, 1911, the company's interest was released to the plaintiff together with the benefit of the agreement with the purchaser and full power to enforce the obligation under that agreement. This was an action by the plaintiff as transferee of this company's right against the purchaser, to recover damages for waste alleged to have been committed by him. Warrington, J., who tried the action, held that, assuming that a claim for damages for waste was assignable, upon the true construction of the assignment, it was not in fact assigned, and with this the Court of Appeal (Cozens-Hardy, M.R. and Farwell and Hamilton, L.JJ.) agreed. They also held that such a claim is not assignable; and they dissented from the dictum of Lord Esher, M.R., in *Witham* v. *Kershaw* (1885), 16 Q.B.D. 613, 616, that "There is an implied covenant on the part of the tenant not to commit waste." There is an interesting comment on this case in 34 L.T. Jour. 354.

INJUNCTION—EASEMENT—RIGHT OF WAY—ALTERATION OF USER—INCREASE OF BURDEN.

White v. *Grand Hotel* (1913) 1 Ch. 113. This was an action to restrict the user by the defendants, of a right of way. The

predecessors in title of the plaintiff and defendants had in 1883 made an arrangement whereby the defendants' predecessor in title acquired the right of way in question. At that time the defendants' premises were used as a private house and the way was used for obtaining access from the stables of the house to a highway—on the defendants acquiring the premises they were used in connection with the business of a hotel carried on by the defendants, and the way was used for the passage of motor vehicles of guests, and the house on the premises was used for the accommodation of drivers. The plaintiff claimed that this was increasing the burden on the servient tenement, and he claimed an injunction to restrain the user of the way otherwise or to any greater extent than it was used in 1883. Joyce, J., who tried the action held that the right of way was unrestricted, and was not confined to the purposes for which it was required when the grant was made. The Court of Appeal (Cozens-Hardy, M.R. and Farwell, and Hamilton, L.JJ.), affirmed this decision, but inasmuch as it appeared that the defendants had altered and widened the gateway to the way as it had existed in 1883, the Court of Appeal varied the judgment by restraining the defendants from exercising the right of way except through a gate in the position of that which stood on the premises when the way was granted.

MONEY PAID UNDER MISTAKE OF FACT—PRINCIPAL AND AGENT—SEQUESTRATOR — RECOVERY OF MONEY PAID BY MISTAKE — MONEY HAD AND RECEIVED—LIABILITY OF PAYEE FOR MONEY PAID BY MISTAKE.

Baylis v. *Bishop of London* (1913) 1 Ch. 127. In this case the plaintiff sued to recover money paid by mistake in the following circumstances. A clergyman of the Church of England having become bankrupt, the bishop appointed a sequestrator of his benefice, and the sequestrator demanded and received from the plaintiff sums of moneys as title rent charge in respect of property of which the plaintiffs had been, but had ceased to be lessees, and the plaintiffs in forgetfulness of the fact paid the money demanded, which was duly applied by the sequestrator in payment of the curate in charge and other outgoings and the balance was handed by him to the trustee in bankruptcy. Neville, J., held, (1912) 2 Ch. 318 (noted ante vol. 48, p. 539), that the bishop was liable to refund and the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Hamilton, L.JJ.) have affirmed his decision.

HIGHWAY—OBSTRUCTION — NOT ALLOWING FREE PASSAGE FOR OVERTAKING VEHICLE—HIGHWAYS ACT (1835), 5-6 W. 4, C. 50), S. 78—(2 GEO. V. C. 47, SS. 3-5, ONT.).

Nuttall v. *Pickering* (1913), 1 K.B. 14. The English Highway Act, s. 78, makes it an offence for the driver of a vehicle not to keep it on the left side of a road for the purpose of allowing free passage for other vehicles: (see 2 Geo. V. c. 47, ss. 3-5 Ont.). The defendant was driving a heavily loaded vehicle so far beyond the centre that a motor vehicle overtaking him could not pass on the proper side and he signalled to the driver of the motor to pass him on the wrong side, which he did without delay or inconvenience, there being no other traffic on the road. The defendant was prosecuted for a breach of the Highway Act, s. 78, and convicted, but the Divisional Court (Lord Alverstone, C.J., and Channell, and Avory, JJ.), set aside the conviction. The gist of the offence is not allowing the free passage of other vehicles, and that, in the circumstances of this case the Court held did not take place.

PATENT—PATENT AGENT — DESCRIPTION OF UNREGISTERED PERSON.

Graham v. *Tanner* (1913), 1 K.B. 17. The English Patents and Designs Act, 1907 (7 Edw. VII. c. 29), s. 84, provides that a person shall not be entitled to describe himself as a patent agent unless he is registered as a patent agent. The defendant, who was not registered as a patent agent, issued a circular in which his firm were described as "experts and engineers" and in which it was stated that the firm were prepared to do the class of work which is usually done by patent agents, but the circular did not, in terms, state that the firm were patent agents. The defendant was prosecuted for having committed a breach of the Act, but the charge was dismissed and the Divisional Court (Lord Alverstone, C.J., and Channell, and Avory, JJ.), held rightly so, though the Chief Justice said he came to that conclusion with great regret.

LANDLORD AND TENANT—COVENANT TO REPAIR—BREACH OF COVENANT—WASTE—RELIEF AGAINST FORFEITURE—CONVERSION OF BUILDING FROM CHAPEL TO THEATRE—REINSTATEMENT OF BUILDING—CONVEYANCING ACT, 1881 (44-45 VICT. C. 41), S. 14 (2, 3).

Hyman v. *Rose* (1912) A.C. 623, is another case in which the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten,

Atkinson, and Shaw) have failed to agree with the Court of Appeal (1911, 2 K.B. 234; noted sub nom. *Rose* v. *Spicer*, ante vol. 47, p. 606). This was the case in which a piece of land was let for a term of 99 years, on which a chapel was being erected and which was afterwards completed and separated from the adjoining street by railings, and was used as a place of worship for sixty years. With the consent of the Charity Commissioners the lease was then sold, and the purchasers proceeded to convert the premises into a theatre, and for this purpose removed the railings and opened a new door and made various changes in the interior. The vendor had neglected to comply with a notice to repair pursuant to a covenant in the lease, and the lessor was entitled to possession under a proviso for re-entry for breach of covenant, subject to the claim of the purchasers for relief against the forfeiture. The purchasers offered as conditions of obtaining relief, to deposit a sum of money to secure the restoration of the premises to their original condition at the end of the lease, and also to erect and maintain a moveable fence of posts and chains in the line of the old fence, in order to exclude the public from the premises. The Court of Appeal held that the alteration of the premises amounted to waste and was a breach of the covenant to repair; and that relief against the forfeiture could only be granted on the terms of the immediate restoration of the premises to their former condition; the House of Lords, on the other hand, took a more liberal view of the matter, and came to the conclusion that as there was nothing in the lease prohibiting the carrying on of a theatre on the demised premises, the alterations in the circumstances constituted neither waste nor a breach of the covenant to repair, and that relief ought to be granted on the terms proposed by the defendants.

ARBITRATION—UMPIRE—REFUSAL OF ARBITRATORS TO APPOINT UMPIRE—APPLICATION TO COURT TO APPOINT UMPIRE—PRACTICE—PARTIES—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S.S. E, 20—(9 EDW. 7 C. 35 S. 9. ONT.).

Taylor v. *Denny* (1912) A.C. 666. This was an appeal from the Court of Appeal on a point of practice under the Arbitration Act, in reference to the appointment of an umpire. By the terms of the submission the two arbitrators had power to appoint an umpire, but on being requested to do so by one of the parties to the reference under s. 5 of the Act, refused to do so. The party requiring the appointment then applied to the Court on

notice to the arbitrators, but the opposite party to the reference, who was out of the jurisdiction, was not notified. One of the arbitrators objected that he was not a proper party and that the other party to the reference was a necessary party to the application. The Judge in Chambers who heard the motion made an order appointing an umpire, with liberty to the party not before the Court to apply to discharge the order within a given time after notice thereof, the costs to be in the arbitration, which order was affirmed by the Court of Appeal (1912) 2 K.B. 542; (noted ante vol. 48, p. 500). The House of Lords (Lord Haldane, L.C., and Lords Halsbury, Ashbourne, Macnaghten, and Atkinson) held that the arbitrators were the proper parties to be notified of the application, and that the application was right in form and the appeal consequently failed.

DAMAGES—BREACH OF CONTRACT—SALE OF GOODS—GOODS NOT ACCORDING TO CONTRACT—PURCHASE OF OTHER GOODS TO MITIGATE DAMAGES—PROFIT ARISING FROM ACT DONE IN MITIGATION OF DAMAGES—APPEAL—JURISDICTION—AWARD INCORPORATING OPINION OF COURT ON CASE STATED BY ARBITRATORS—ERROR ON FACE OF AWARD.

British Westinghouse Elec. M. Co. v. *Underground Electric Railways* (1912) A.C. 673, is one of those cases in which if the suitors adopted the celebrated opinion of Mr. Bumble concerning the law, one would think they did so with some shew of reason. The way the case has been bandied about from Court to Court, though affording excellent entertainment to those in the game, must, one should think, prove highly exasperating to those who are looking for a speedy adjudication of their rights. The question at issue was simply the measure of damages for breach of a contract—and this is how it has worked out—the contract was for the supply of machines to an electric railway; the machines supplied were not according to contract, and, in order to mitigate the damages from the breach, the railway company purchased greatly improved machines from another firm. The cost of these machines the railway company claimed as part of its damages. The arbitrators to whom the fixing of the damages had been referred, submitted that question to the Court; and the Divisional Court (Lord Alverston, C.J., and Hamilton and Avery, JJ.) held that the railway were entitled to recover the cost of the substituted machines. The case then went back to the arbitrators, who, as in duty bound, adopted the

ruling of the Divisional Court and allowed the costs of the substituted machines. A motion was then made against the award on the ground of alleged error of law, the alleged error being the allowing the cost of the substituted machines; but the Divisional Court thought that it was not open to it to review the law laid down by Lord Alverstone, C.J., and his colleagues, because that was a consultative opinion from which no appeal lay, and in their opinion was conclusive between the parties. They therefore dismissed the appeal, and from that decision an appeal was had to the Court of Appeal which was divided on the point, one Lord Justice thinking that decision of the first Divisional Court was not conclusive, the other two thinking it was. This, of course, naturally led to a further appeal to the House of Lords (Lord Haldane, L.C., and Lords Ashbourne, Macnaghten and Atkinson) and their Lordships' final decision is that a consultative opinion given by a Court on a stated case, though not itself appealable, is nevertheless not conclusive, and may be the subject of attack if adopted by arbitrators, and appearing on the face of their award. Their Lordships therefore held that there was jurisdiction to set aside the award on that ground, which they did, because it did not provide for the abatement from the cost of the substituted machines, of any benefit or profit realized by their user; and they further found that the pecuniary advantage which the railway company had derived by the use of the substituted machines by saving of fuel, etc., etc., was a matter to be taken into account in assessing the damages. The case was therefore remitted to the arbitrators.

MASTER AND SERVANT—NEGLIGENCE—MINE OWNER—HOISTING AND LOWERING APPARATUS — BRAKE — FATAL ACCIDENT — BREACH OF STATUTORY DUTY.

Watkins v. *Naval Colliery Co.* (1912) A.C. 693, was an appeal from the Court of Appeal (1911) 2 K.B. 162 (noted ante vol. 47, p. 457). The action was to recover damages for a fatal accident. By a statutory provision "Proper apparatus for raising and lowering persons at each shaft shall be kept on the works belonging to the mine and shall be constantly available for use." The accident arose from the apparatus being used to lower too many men at once and from having an inefficient brake and spanner bar, due to the negligence of the defendant's foremen, but not to their own negligence, they having provided reasonably proper and efficient foremen. The

Court of Appeal thought the defendants were not under any absolute obligation to provide efficient apparatus, and that they discharged their duty if they supplied such apparatus as their expert manager deemed sufficient, and therefore that they were not liable. The House of Lords (Lord Haldane, L.C., and Lords Halsbury, Macnaghten and Atkinson) held this view to be erroneous and that the statutory duty was absolute and had not been discharged, and therefore the defendants were liable.

PRACTICE — DISCOVERY — AFFIDAVIT OF DOCUMENTS — FURTHER AFFIDAVIT.

British Association of Glass Bottle Manufacturers v. *Nettlefold* (1912) A.C. 709. It is somewhat surprising to find a case getting into the House of Lords on a simple point of practice, yet such is the case. The Court of Appeal had ordered the appellants to file a better affidavit of documents, on the ground that it appeared that the defendants were under a mistake as to the relevancy of documents and that their affidavit of documents was consequently discredited. The appellants claimed that their affidavit was conclusive. Their Lordships (Lord Haldane, L.C., and Lords Ashbourne, Macnaghten and Atkinson), however, agreed with the Court of Appeal (1912) 1 K.B. 369 (noted ante vol. 48, p. 217) that although as a general rule the affidavit of documents is conclusive in the absence of the admission that there are other documents than those produced which are material; yet where the affidavit is based upon a misconception as to the materiality of documents in the deponent's possession, and the Court is certain that he has in his possession or power other relevant documents which ought to have been disclosed and which would have been disclosed if the deponent had rightly conceived his case, then it is right and proper to order a better affidavit to be made.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—LIABILITY OF PRINCIPAL FOR FRAUD OF AGENT.

Lloyd v. *Grace* (1912) A.C. 716. It is not very surprising to find that in this case the House of Lords (Lords Loreburn, Halsbury, Macnaghten, Atkinson and Shaw) have reversed the decision of the Court of Appeal (1911) 2 K.B. 489 (noted ante vol. 48, p. 614). The plaintiff, a widow, who owned two cottages, and a sum of money secured on mortgage, being dissatisfied with the income, went to the office of a firm of solicitors, the defendants, with a view to improving her income. She saw

their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, he induced her to give him instructions to sell the cottages, and call in the mortgage money, and for that purpose to give him the deeds (for which he gave a receipt in the firm's name), and to sign two documents, which were neither read over nor explained to her, and which she believed it was necessary to sign in order to effect the sale of the cottages. These documents were in fact transfers to the clerk of the cottages and mortgage, and by means of them he dishonestly disposed of the property for his own benefit. The Court of Appeal thought that the clerk was not acting within the scope of his authority and that as his master got no benefit from the fraud, therefore that the defendant was not liable; but the House of Lords holds that he was acting within the scope of his authority, and his master was consequently liable for his fraud, which seems a very reasonable and just conclusion. The attempt to escape liability on the ground that the principal had derived no benefit from the fraud was based on *Barwick* v. *English Joint Stock Bank*, L.R. 2 Ex. 259, but their Lordships hold that case does not lay down any such proposition as, that in order to make a master liable for the act of his servant the master must have profited by it. The only difference which arises where the master gets the benefit, is that he may then be said to have adopted the act. As Lord Macnaghten observes, it would have been absolutely shocking if the master were not held liable in such circumstances.

MORTGAGE—PRIORITY—MORTGAGE TO BANK TO SECURE CURRENT ACCOUNT—SUBSEQUENT MORTGAGE—NOTICE—APPROPRIATION OF PAYMENTS—RULE IN CLAYTON'S CASE.

Deely v. *Lloyds Bank* (1912) A.C. 756. This was an appeal from the Court of Appeal (1910) 1 Ch. 648 (noted ante vol. 46, p. 449). The question involved is comparatively simple. One Glaze in 1893 mortgaged land to a bank to secure his current account, limited to £2,500. In 1895 he gave a second mortgage on the property to secure £3,500 to his sister Mrs. Deely. Frank Deely, her husband, acted as solicitor for Glaze in the transactions which led to the litigation. Notice of the Deely mortgage was given to the bank, but they continued the account as an unbroken account, instead of opening a fresh account. Glaze from time to time made payments into his account, which, if applied according to the rule in Clayton's case, would have

paid off the moneys due to the bank at the date of the second mortgage, by January, 1896. The bank forgot about the second mortgage, and Deely and her husband believed that the bank's mortgage was a continuing security in priority to Mrs. Deely's, and the account was dealt with on that footing. The bank never allowed Glaze to overdraw his account beyond the secured amount, except temporarily and on deposit of additional security. On several occasions Mrs. Deely authorized her husband to deposit her mortgage with the bank to secure Glaze's account. In 1896 and 1897 Glaze made specific appropriations of payments into his account without any alteration being made in the form of the account as shewn by the pass-books. In 1899 the bank realized the security for a sum just sufficient to pay the amount due them, and retained the proceeds. Glaze in the same year was made bankrupt. At that time Mrs. Deely made no claim to priority and her husband induced the bank to give up a claim under a collateral guarantee given to them at the time of their mortgage, on the representation that the discharge of their mortgage put an end to the guarantee; and thereupon Mrs. Deely obtained the release of a counter-guarantee she had given to the guarantor. In 1905 the present action was commenced by Mrs. Deely against the bank for the usual account, and for a declaration that in taking these accounts the bank were not entitled to charge for advances made to Glaze after notice of the Deely mortgage. The Court of Appeal refused the declaration, but the House of Lords (Lords Macnaghten, Atkinson and Shaw) held that the plaintiff was entitled to it, and that the rule in Clayton's case applied and was not excluded by the conduct of the parties.

NUISANCE — INJUNCTION — POLLUTION OF STREAM — MUNICIPAL BODY — WORKS FOR OBVIATING ALLEGED NUISANCE — SUFFICIENCY OF REMEDY—REFERENCE TO EXPERTS—INJUNCTION —DISCHARGE OF INJUNCTION ON UNDERTAKING.

Attorney-General v. *Birmingham T. & R. District* (1912) A.C. 788. In this case Kekewich, J., had granted a perpetual injunction restraining a municipal body from polluting a stream by discharging sewage into it, in contravention of a statute. On an appeal therefrom the Court of Appeal ordered a reference to an expert to ascertain whether the effluents discharged had been freed from noxious matter and the expert having reported that the effluent discharged into the stream was freed from noxious matter so as not to affect the purity of the

water of the river, whereupon the Court of Appeal accepted the undertaking of the defendants to use their best endeavours to prevent any breach of the statutory provisions, the injunction was discharged (1910) 1 Ch. 48 (noted ante vol. 46, p. 93.) From this order the present appeal was brought; and the House of Lords (Lords Loreburn, Atkinson, Garrell and Robson), while holding that the Court had jurisdiction to rescind the injunction, yet thought it ought not to have done so on the limited undertaking given, for which the House directed the defendants to substitute an undertaking that the existing results as described in the report of the expert should in future be maintained by them; and the defendants were condemned in three-fourths of the costs of the appeal.

TELEGRAPH CABLES—TAXATION OF TELEGRAPH COMPANIES—COMPANY OWNING CABLES BUT NOT CARRYING ON BUSINESS.

Commercial Cable Co. v. *Attorney-General of Newfoundland* (1912) A.C. 820. The Commercial Cable Co. has telegraph cables landed on the island of Newfoundland, but by contract with the Government confirmed by provincial statute it is prohibited from competing with the Government and from receiving and transmitting business in Newfoundland, a prohibition which it has not transgressed. A provincial Act imposes taxation on all telegraph companies carrying on business in or from the island in respect of every cable (not exceeding five) landed thereon. The Government claimed to tax the plaintiffs' cables, which claim was allowed by the Colonial Supreme Court, but the Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson and Shaw) held that the Act only applied to the cables of companies doing business, and that the plaintiffs were not doing business, and their cables were therefore exempt from taxation.

DOMINION LANDS ACT (R.S.C. 1886, C. 54)—ROAD ALLOWANCES—NORTH-WEST IRRIGATION ACT, 1898—INTERSECTION OF ROAD ALLOWANCES BY IRRIGATION CANALS—BRIDGING POINTS OF INTERSECTION.

The King v. *The Alberta Ry. Co.* (1912) A.C. 827. In this case the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Dunedin and Atkinson) have reversed a judgment of the Supreme Court of Canada. The short point being this. The Alberta Railway Co. having power to construct irrigation works, under the North-west Irri-

gation Act, 1898, obtained authority to carry the irrigation canals constructed by them across the road allowances met with in their route—and the question was whether they could exercise this right without also providing necessary bridges wherever they thus rendered the road allowances impassable. The Supreme Court was of the opinion that as to travelled roads the company were bound to provide bridges, but the majority of that Court considered that the certificate of the Commissioner of Public Works under which the canals were authorized exonerated the railway from providing bridges at the intersection of road allowances which were not travelled.

POWER TO ERECT POLES FOR ELECTRIC WIRES IN STREETS—RIGHT OF MUNICIPALITY TO PREVENT ERECTION OF POLES—2 EDW. VII., C. 107, S.S. 12, 13, 21D.—RAILWAY ACT, 1888, S. 90D.—RAILWAY ACT, 1906, S. 247D.

Toronto & Niagara Power Co. v. *North Toronto* (1912) A.C. 834. This is the case in which the plaintiffs successfully established their right under their act of incorporation, 2 Edw VII., c. 107, Can., to erect their poles in the public streets of North Toronto without the permission or consent of the municipality, and also established that s. 90 of the Railway Act of 1888, as amended by the Railway Act, 1906, s. 247, being inconsistent with the plaintiffs' special Act, was by s. 21 of the latter Act inapplicable to the plaintiffs. The judgment of the Court of Appeal for Ontario was therefore reversed by the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Dunedin and Atkinson and Sir Charles Fitzpatrick).

NEGLIGENCE—MOTOR CAR—RETENTION OF CONTROL OF CAR BY OWNER.

Samson v. *Aitchison* (1912) A.C. 844. This was an appeal from New Zealand. The action was for damages for injuries occasioned by the negligent driving of a motor car. The facts were a trifle peculiar—a Mrs. Collins was desirous of buying a motor car. Samson offered to sell her his own car and took her for a drive in the car. On returning, Mrs. Collins was anxious that her son Albert should give his advice and opinion about the car, he having had two years' experience as a chauffeur. For the purpose of testing the car as a hill climber, all three got into the car, Samson driving. As they were coming down hill Samson and Albert changed seats and Albert took the wheel.

Whether this was done at Samson's or Albert's suggestion was disputed, and while Albert was driving the accident in question took place. The Court below found in these circumstances that Samson as owner, though he invited Albert to drive the car, retained control of the car and was responsible as principal for the injury occasioned by the negligence of Albert, in the absence of proof that he had by contract or otherwise abandoned the right of control over the car to Albert. The judgment in favour of the plaintiff Aitchison was therefore affirmed.

COVENANT—RENTAL TO BE VARIED ACCORDING TO ELECTRICAL ENERGY GENERATED—CONSTRUCTION.

Attorney-General v. *Canadian Niagara Power Co.* (1912) A.C. 852. This was the case in which the agreement between the Ontario Government and the Canadian Niagara Power Co. was in question. By the agreement a certain specified rental was payable and also "In addition thereto payment at the rate of $1 per annum for each electrical horse-power generated, used and sold or disposed of over 10,000 e.h.p. up to 20,000 e.h.p., and the further sum of 75 cents for each e.h.p. generated and used and sold or disposed of over 20,000 e.h.p. up to 30,000 e.h.p., and the further sum of 50 cents for each e.h.p. generated and used and sold or disposed of over 30,000 e.h.p." The question between the parties appears to have been whether, in the construction of this agreement, the additional payment was to be based on the highest amount of e.h.p. generated at any time until a subsequent higher record is made, or whether the average horse-power generated in a given period should be the basis. With some hesitation the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten and Atkinson and Sir Charles Fitzpatrick) came to the conclusion that the additional rental was to be based on the highest amount of e.h.p. generated at any time and to remain thereat until a higher amount is reached, when it is to be increased accordingly and so from time to time as each higher amount is generated.

CONVEYANCE—RESERVATION TO GRANTOR OF MINES, MINERALS AND SPRINGS OF OIL—NATURAL GAS.

Barnard-Argue-Roth-Stearns Oil & Gas Co. v. *Farquharson* (1912) A.C. 864. This was an appeal from the Court of Appeal for Ontario, 25 O.L.R. 93. The case turns upon a reservation to the grantors of all "mines, minerals and springs of oil" upon certain land conveyed by the Canada Company in 1867 to the

plaintiffs' predecessor in title. Many years after the grant natural gas was discovered on the land and the Canada Company claimed it under the reservation in the deed and granted it to the defendant company with the right to enter and recover it. The action was brought to restrain the defendants from entering upon or interfering with the plaintiffs' land. The Chancellor who tried the action held that the reservation carried the right to oil, but not the right to search and bore for natural gas. The Court of Appeal affirmed this decision, Meredith, J.A., dissenting. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten and Atkinson and Sir Charles Fitzpatrick), while conceding that natural gas being neither animal nor vegetable must be classed as a "mineral," yet were of the opinion that the reservation of minerals in the deed was not to be construed in the widest sense, but by the intention of the parties when the deed was made—and it appearing by the evidence that natural gas did not become commercially valuable until 1880 and that prior thereto it had been regarded as a destructive and dangerous element to be got rid of if possible, and that it did not begin to be utilized until 1890. Their Lordships thereupon concluded that it could not be inferred that this product was included in the reservation in 1867. The judgment of the Court of Appeal was therefore affirmed.

B.N.A. ACT, S.S. 91, 92—MARRIAGE—DOMINION JURISDICTION OVER MARRIAGE—SOLEMNIZATION OF MARRIAGE.

In re Questions Concerning Marriage (1912) A.C. 880. This is the case in which the questions touching the Dominion Parliament's jurisdiction over marriage and its right to pass the proposed Lancaster Bill are discussed. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Halsbury, Macnaghten, Atkinson and Shaw and Chief Baron Palles) determined that the Dominion Parliament had no power to pass the proposed bill. The question whether the law of the Province of Quebec renders null and void a marriage between Protestant and Roman Catholic or between two Roman Catholics unless solemnized before a Roman priest their Lordships treat as superfluous and do not answer. Their Lordships are of the opinion that the powers conferred on the Dominion Parliament concerning marriage do not cover "the whole field of validity," but that the provinces by virtue of their jurisdiction over the solemnization of marriage have also power so to legislate on that subject so as to affect the validity of marriages. On the whole

it cannot be said that the matter is, as a result of the debate, placed on a satisfactory footing. The divided jurisdiction instead of being any advantage to the public is proving rather the reverse, as it makes it all the more difficult to legislate in a satisfactory way on the subject or establish a uniform law throughout the Dominion.

FATAL ACCIDENT—PRISONER BURNT TO DEATH IN LOCK-UP.

McKenzie v. *Chilliwack* (1912) A.C. 888. This was an action by the widow of a man who had been burnt to death while a prisoner in a lock-up in a small rural township in British Columbia. The defendants were the township and the negligence complained of was the not keeping a man constantly in charge of the lock-up. The fire appeared to have originated in the cell, but how was not shewn. The Judge at the trial dismissed the action and his decision was affirmed by the Court of Appeal of British Columbia; and the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Atkinson and Shaw, and Evans, P.P.D.) also agreed that the defendants were not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners, in which there is no fire and matches are not allowed, and therefore that the action was rightly dismissed.

Correspondence.

THE MARRIAGE QUESTION.

Editor, CANADA LAW JOURNAL:

DEAR SIR,—There are some points in Mr. E. F. B. Johnston's interesting paper on the Law of Divorce in Canada, recently published in your Journal (ante p. 1) which I should like to refer to.

At the close of his article (p. 15) he ventures the suggestion that some punishment should be visited upon those who so violate their matrimonial obligations as to render the continuance of cohabitation, under reasonable conditions, impossible. This suggestion is well worthy of careful consideration.

The marriage contract is one in which not merely the parties to it are interested, it is, on the contrary one in which the whole community is concerned. Our whole social system is founded on marriage, and a violation of its obligations is not only a wrong to the individual, it is more or less a crime against the state, and if matrimonial offenders had the fear of a term of im-

prisonment, or fine, before their eyes, it might have a wholesome effect. Mr. Johnston seems to assume that men alone are matrimonial offenders deserving of punishment, but the divorce statistics of Canada will shew that there are nearly, if not quite, as many women as men whose misdeeds have been grounds for divorce. But such statistics are illusive, and if the full facts of all divorce cases were thrashed out it would often appear that the supposed innocent party was really very far from innocent. Many petitions which now go undefended might have a very different result if it were known that the respondent, if found guilty, would have to serve a term of imprisonment.

But that a Parliament of men would be willing to pass any such law, seems somewhat doubtful.

Mr. Johnston asks, where a married couple find themselves in a condition which has become intolerable, "why should they not be restored to their original position?" The obvious answer to that question, is that it is simply impossible to do so, the granting of a divorce cannot do it. A divorce does no more than put a legal end to a status which is not a mere legal status, but a social and a moral one; but it cannot by any possibility restore the parties to their original position, as if they never had been married; and it is precisely this fact which makes the question of divorce so difficult. It is, at best, a rude, imperfect and doubtful remedy for an irremediable wrong. The ordinary legal principle on which contracts are rescinded, is, that such a remedy can only be given where the parties can be restored to their original position as if the contract had never been made. If the contract has been partly executed and it is impossible to restore the parties to the *status quo ante* the only remedy is in damages. Those who advocate a divorce law, therefore, virtually desire that to the marriage contract a wholly new principle of law shall be applied.

Mr. Johnston suggests that in the consideration of the subject of his proposal to establish a Divorce Court in Canada, we should eliminate the religious question entirely. We think he is mistaken in this, and that the religious aspect of the question must be kept steadily in view. It must be always remembered that there is a great body of opinion in Canada in favour of the view that marriage is not a mere civil contract, but that it involves a sacred religious obligation, and any legislation which may be proposed must be framed with due regard to that opinion. The difficulty, of course, is that any such law must be general in its operation, you cannot frame it so as to exclude any denomination from its operation, if they choose to avail

themselves of it. At the same time any such measure in order to have any chance of adoption must be of an extremely conservative character in view of the opinion we have referred to.

One other matter might be referred to. Mr. Johnston states that Henry VIII. adopted the remedy of applying to Parliament for a divorce. If he intended this statement to apply to the so-called divorce of Katherine of Arragon, he appears to be mistaken. The statute, 25 Hen. VIII. c. 22, which he may possibly have had in mind, itself shews that this was not the case. That Act did not grant the so-called "divorce," but merely affirmed the "separation" decreed by the Archbishop of Canterbury. Henry's suit, it may be observed was not for a divorce; it was for nullity of marriage on the ground that Katherine was his brother's widow, and therefore the parties were within the prohibited degrees of relationship and incapable of lawful marriage. There was never any question that the parties were within the prohibited degrees; but Pope Julius sanctioned the marriage. Learned divines were divided in opinion whether he had exceeded his power in so doing. Some held that he had power, others held that although he had power to permit marriages within degrees prohibited by mere ecclesiastical authority, he had no power to dispense with the laws of God, as set forth in Leviticus; that marriage with a brother's wife is prohibited in Leviticus, and therefore no one had power to dispense with that law. Those who think there is such power regarded and will continue to regard the marriage as valid, and therefore indissoluble. Those who think that no one has such power thought, and will continue to think, that the marriage was properly declared to be null and void.

I refer to this point because there is no great historical question concerning which there has been so much misunderstanding, or misrepresentation, by historians and others as to the real facts of the case from its legal aspect.

To conclude, Mr. Johnston speaks of impediments of relationship as if they were all "some remote or fanciful connection between the parties and their god parents." There is no doubt some impediments of this character were created by ecclesiastical authority, but those that are laid down in Leviticus, and which are the only prescribed degrees recognised by law in Canada, are of a different character, and founded on principles applicable to the whole human race for all time. No one can say of them that they were instituted for the purpose of raising money by dispensing with their observance.

Yours, etc.,

CONSTANT READER.

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT.

HIGH COURT DIVISION.

Falconbridge, C.J.K.B.] SNELL *v.* BRICKLES. [Jan. 28.

Vendor and purchaser—Contract for sale of land—Time of essence of contract—Failure of purchaser to close in time—Duty of vendor as to tender of conveyance.

This was an action for specific performance of a contract to convey lands. The defendant sought to rescind the contract on the ground that time was of essence of the contract and that the plaintiff neglected to close the transaction on the proper date. The agreement provided: "$2,000 to be paid upon the acceptance of title and delivery of deed and give you (vendor) back a first mortgage on the property for the remainder, repayable in five years from the date of closing."

Held, 1. The general rule, in the absence of other provision, is, that the purchaser prepares the conveyance at his own expense: *Foster* v. *Anderson* (1907), 15 O.L.R. 362, at p. 371; *Stevenson* v. *Davis* (1893), 23 S.C.R. 629, but this rule was waived by the provision in the contract above set out, and it was the duty of the vendor to prepare and tender to the purchaser the conveyance. The vendor's solicitors recognized that duty because they wrote to the purchaser's solicitors enclosing a draft deed for approval.

2. That purchaser was not in default and judgment for specific performance was directed.

W. Proudfoot, K.C., for purchaser. *J. E. Jones*, for vendor.

Province of Quebec.

COURT OF REVIEW.

Tellier, DeLorimier, Greenshields, JJ.] [Dec. 13, 1912.

DULAC *v.* LAUZON.

Contracts—Building contracts—Extras—Substantial performance.

Held, 1. A builder or contractor who agrees to build according to plans and specifications for a fixed price cannot recover

for alterations and extras unless such alterations and extras and the price to be paid therefor are stipulated in writing, and parol evidence of such additional contract alleged to have been made verbally is inadmissible.

2. Where a builder's contract calls for payment as the work progresses, the owner of the building is not entitled to retain in his hand a large amount of the contract price on the ground that the work has not been properly done, when it is established that the work of a value of $8,000 is all finished saving a few trifling imperfections (e.g., $15.40), and in such case the owner will be condemned to pay the balance of the contract price less the value of such imperfections.

J. A. Robillard, K.C., for plaintiff, appellant. *N. U. Lacasse,* for defendant, respondent.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Feb. 5.

JOHNSTON *v.* MUNICIPALITY OF THE COUNTY OF HALIFAX.

Consolidated Public Health Act—Suppression of contagious or infectious disease—Local Board of Health—Powers of — Liability of municipality for debts incurred.

Under the provisions of the Consolidated Public Health Act, N.S. Acts of 1910, c. 6, s. 25, "If any person . . . is infected with . . . smallpox, diphtheria, etc., the local board of the district in which such person is, may make effective provision in the manner which to it seems best for the public safety by removing such person to a separate house . . . and by providing nurses, etc., at his own cost or charge or the cost of his parents or other person or persons liable for his support if able to pay the same; otherwise at the cost and charge of the municipality." By section 29 of the Act, sub-section (1), "all necessary expenses incurred by a local board in suppressing any infectious or contagious disease shall be a charge upon the municipality."

Held, by Graham, E.J., and Ritchie, J., following the case of *Cameron* v. *Dauphin,* 14 Man. 573, and dismissing defendant's

appeal, that the municipality was primarily liable for obligations incurred by the local board in connection with the suppression of contagious or infectious disease, with a remedy over against the patient or other person or persons liable for his support if able to respond.

An allegation in the statement of claim that plaintiff is a physician "duly registered," where not denied, is equivalent to an admission of registry.

Per Meagher, and Drysdale, JJ., that proof of inability on the part of the patient or those liable for his support to pay was a condition precedent to the right to recover against the municipality.

Appeal dismissed without costs.

O'Connor, K.C., for defendant, appellant. *Nem. con.*

Province of British Columbia

COURT OF APPEAL.

Full Court.] [Nov. 5, 1912.

MURRAY *v.* COAST STEAMSHIP COMPANY.

Master and servant—Wages—Discharge for disobedience—Result as to wages not yet accrued—Sunday—Emergency—Meaning of word as applied to work on a ship—Lord's Day Act—Sunday work.

Held, 1. A contract for service contains an implied condition that if faithful service is not rendered the master may elect to determine the contract, and where that right is properly exercised by the master during the currency of the servant's salary, the servant has no remedy, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on condition that he had fulfilled his duty as a faithful servant down to that later date. (Dictum per Irving, J.A.).

2. As to "cases of emergency in conection with transportation," as applied to an ablebodied seaman at cargo work on a ship, the word "emergency" must be given an elastic and varying meaning acording to the circumstances, especially in the case

of vessels engaged in the coasting trade in dangerous waters where conditions of wind, tide, and weather must be carefully considered beforehand and duly provided for by the master, so as to insure, as far as possible, the safety of the vessel and those on board.

3. It is the duty of an ablebodied seaman in service on a ship to obey the master of the ship, and he cannot refuse to work at cargo on Sundays simply to vindicate a principle against Sunday work.

4. Where the substituted holiday provided for by the Lord's Day Act, is being claimed, it is the duty of the employee to do the work and then demand the substituted holiday during the next six days.

McCrossan, for plaintiff, applicant. *Harold Robertson,* for defendant, respondent.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott and Simmons, JJ.] [Dec. 18, 1912.

CHADWICK *v.* STUCKEY (No. 2).

Specific performance—Rescission of contract—Failure to pay purchase instalment, effect of—Subsequent tender.

Where, under an executory contract for the sale of land providing for the payment of the purchase price in instalments, the vendee made default in the payment of an instalment when due, though it was expressly agreed that time should be of the essence of the contract, and notice was terminated pursuant to the terms of the contract, yet a forfeiture will not be allowed by the court where it appears that a substantial amount, both absolutely and relatively to the whole purchase price, has been paid and the default had continued for only two months after the notice was given, at which time the vendee tendered the amount in which he was in default, and the vendee may notwithstanding be declared entitled to specific performance of the contract.

Chadwick v. *Stuckey,* (No. 1), 6 D.L.R. 250, reversed; *Labelle* v. *O'Connor,* 15 O.L.R. 519, distinguished; *B.C. Orchard Land*

Company v. *Kilmer*, 2 D.L.R. 306, 20 W.L.R. 892, specially referred to.

Jones, Pescod & Adams, for the appellant. *McCarthy, Carson & McLeod*, for the respondent.

Stuart, Simmons, and Walsh, JJ.] [Dec. 19, 1912.

ELLIS *v.* FRUGHTMAN.

Damages—Penalty or liquidated damages—Wrongful dismissal —Stipulated damages.

Where a contract contains a provision that either party to it may terminate it on payment of $500 to the other party, said amount may be either a penalty or liquidated damages; such question is one of law to be determined by taking into consideration the intention of the parties from the language used and the circumstances of the case taken as a whole as at the time the contract was made.

Law v. *Local Board of Redditch*, [1892] 1 Q.B. 127, referred to.

C. C. McCaul, K.C., for defendant, appellant. *G. A. Grant*, for plaintiff, respondent.

Flotsam and Jetsam.

LETTER-BOX OUTRAGES.—There is very little doubt that the misplaced leniency shewn to the women convicted of offences in connection with the militant suffragist propaganda has been largely responsible for this last outbreak of female hooliganism, and short shrift should be given to any persons convicted of this latest form of violence. Under s. 61 of the Post Office Act, 1908, placing injurious substances in letter-boxes is punishable on summary conviction by a fine of £10, or on conviction on indictment to imprisonment with or without hard labour for twelve months. The time has now arrived for compelling these women to serve their complete sentences, and to let them take the full consequences of their starvation tactics in prison. The militant movement has proved a good thing for many of the so-called leaders, but these and their hysterical followers should be made to feel the utmost rigour of the law.—*Law Times.*

Canada Law Journal.

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SOLE AGENCY—VIOLATION OF CONTRACT FOR EXCLUSIVE TERRITORY—MEANING OF "PUBLICATION."

CANADA LAW BOOK CO., LIMITED v. BUTTERWORTH & CO. AND BUTTERWORTH & CO. (CANADA), LTD.

A recent decision in the Province of Manitoba in an action brought by the plaintiffs to restrain defendants from selling "Halsbury's Laws of England" in Canada, as being in contravention of an agreement set up by plaintiffs, brings up several interesting and important questions.

Among the many points which came up at the trial was the interpretation of the word "publication," the meaning of which, so far as we remember, had not up to the present time been judicially determined. In this case the evidence established that where the word is used in connection with a series of books, such as "Halsbury's Laws of England," the completion of the series is intended. The finding of the court was largely based upon the violation of a sole agency contract, as to which an injunction and damages were claimed and allowed.

The correspondence, part of which appears in the judgment, is suggestive and throws light upon a business transaction in which a large number of the profession are directly interested.

The action was brought in the Manitoba Court of King's Bench and was tried before Hon. Mr. Justice Metcalfe, who delivered judgment on March 10th in favour of the plaintiffs as follows:—

METCALFE, J.:—The plaintiff does business as a dealer in law books, throughout the Dominion of Canada, the United States and elsewhere. One S. S. Bond is the sole proprietor of the defendant Butterworth & Co., law book publisher, of London,

England. The other defendant, Butterworth & Co. (Canada), Limited, is a joint stock company, incorporated in England, having its head office for Canada at Winnipeg. Of the 1,000 shares issued by the company, Mr. Bond owns 999. The remaining share is owned by Mr. Bond's solicitor.

Prior to the year 1907, the defendants Butterworth & Co. were about to publish a work known as "Halsbury's Laws of England." This work is copyrighted and the copyright is owned by Butterworth & Co. That firm sent out circulars of advertisement by which the work is described as "The Laws of England, being a complete statement of the whole law of England, by the Right Honourable The Earl of Halsbury . . . in 18 to 20 volumes."

Some of these circulars were sent to Canada, with order forms attached, and inviting orders at the reduced rate of 21 shillings net, delivered. The Canada Law Book Co., having already had similar dealings with Butterworth & Co., opened a correspondence with a view to obtaining the exclusive right to sell this work in Canada and the United States.

On the 7th of March, 1907, the Canada Law Book Co. wrote Mr. Bond. The material parts of the letter are as follows:—

S. S. Bond, Esq.,
Messrs. Butterworth & Co.,
12 Bell Yard, Temple Bar,
London, England.

Dear Sirs,—When I was in England in July last you stated that you would communicate with me early after the first of the year in regard to Halsbury's Laws, as to the sole agency for this country and the United States.

On receipt of this letter please advise me by cable if you will accept our offer, which we now make, and which is on exactly the same terms and arrangements which I made with Green in regard to the Encyclopedia, second edition. We will undertake to purchase 300 sets within two years, paying you the sum of 7s. per volume, we to have the sole agency in Canada and the United States, and you to agree not to sell any copies in this country, and to notify the trade in London that they are not to sell in this territory.

Trusting to hear from you by cable on receipt of this letter, I am,

Yours very truly,

Canada Law Book Company, Limited,
R. R. Cromarty.

Afterwards one Robinson, acting on behalf of the plaintiffs, called on Mr. Bond in London, who thereupon made a proposal to Mr. Robinson, embodied in a memorandum reduced to writing, but not signed, which he handed to Mr. Robinson, and which memorandum is as follows:—

Given to Mr. Robinson.

1. Order to be accepted by the Company.
2. Sets not to be returned to England.
3. We to do our best to prevent sale to Canada.
4. Sole agency to Canada and U.S.A. for five years from publication of volume I. or for one year after publication of the last volume of the set, whichever shall be the longest period.
5. Sole agency after the above-mentioned period shall be obtained by their taking fifty sets for the first year and forty sets for the next year, and so by a sliding scale to ten sets for the fifth year.
6. Five hundred sets at 7s. 6d. in quires to be taken within two years, ordinary account.
7. We to hand over the orders from above territory received before this date, and to receive a bonus of 3s. 0d. per volume for the same; also to refer future orders and enquiries while this agreement lasts to the Canada Law Book Co.
8. B. & Co. to take back up to 100 sets at same price as charged, at completion of the expiry of the sole agency.

After Robinson's return to Canada, the Canada Law Book Co., having that memorandum before it, wrote to Mr. Bond its letter of May 21st, 1907, the material parts of which are as follows:—

Referring further to Halsbury's Laws of England, Mr. Robinson has just handed me the proposition you made to him. . . . As to the guarantee of fourteen volumes, the additional volumes, of course, will be free. We were to take 300 sets inside of five years from September last. It seems to me your proposition is a pretty stiff one.

. . .

We should like very much to handle the sale of Halsbury's Laws, and would be able to give you much better satisfaction than you could get through any other channel, but the terms are too stiff. If you want the assurance of an annual sale of this work, you may rest assured that if the sale can be made, we can do it, and if the agency is handed over to us, it will receive proper attention from us. If you wish, we will meet you half way, and pay 7s. 6d. per volume. We to agree to take 400 sets within two years, for the sole agency for Canada and the United States for five years, from the date of publication. We will waive the right to return any copies, all of which will be purchased outright. You will hand over to us any orders you

have in Canada and the United States, without any cost to us. We will agree to supply them at the special price. . . .

On receipt of this letter, you might wire me acceptance or refusal. We, of course, have the right to purchase additional sets at the price.

Yours very truly,

Canada Law Book Company, Limited.

Upon receipt of that letter, Mr. Bond, on the 13th of June, 1907, cabled as follows:—

Cromarty, Toronto.

Halsbury's Laws. Agree your modified terms. Writing.

This cablegram was unsigned. It is explained that in business dealings, it is quite usual to omit the signature to such cables. The cable was followed by a letter, dictated by Mr. Bond, and signed by Butterworth & Co., dated June 14th, the material parts of which are as follows:—

THE LAWS OF ENGLAND.

By the Earl of Halsbury and a Distinguished Body of Lawyers.

We are in receipt of your letter of May 21st with reference to the above. Although we think that you should not have had any difficulty in falling in with our proposal, yet we will agree to accept your modification of our terms. The terms between us are now as set out overleaf.

We cabled as requested as follows:—

Cromarty, Toronto. Halsbury's Laws. Agree your modified terms. Writing.

The terms "overleaf" were set forth on a separate sheet accompanying the letter. The following is a copy:—

Arrangements with The Canada Law Book Company, Ltd., for "Halsbury's Laws of England."

1. This arrangement to be between the Company, if we decide to make one for this undertaking.

2. Sets not to be returned to England.

3. Butterworth & Co. to do their best to prevent sale to Canada.

4. Canada Law Book Company to take four hundred (400) sets within two years in return for the sole agency to Canada and the U.S.A. for five years from date of publication of Volume I. During the said sole agency they to have the right of purchasing additional sets at the same price.

5. Butterworth & Co. to hand over any orders from above territory that they have received.

June 14th, 1907.

Mr. Cromarty, who appears to be the governing power of the Canada Law Book Co., says that he did not see that letter, nor the "overleaf" memorandum until the spring of the year 1912. While at first glance this might appear unlikely, I have given weight to the explanation of Mr. Cromarty, who says that, after the receipt of the cablegram, he was absent from home because of bad health, and that the letter, arriving in his absence, instead of being filed with the cablegram and the other letters in a file under the heading of "contracts" was filed by his filing clerk in the general correspondence. I believe Mr. Cromarty's testimony on this point, and I find as a fact that this letter was not brought to his personal attention, nor to the attention of anyone in authority in the employ of the plaintiff company until some time in the spring of 1912.

Mr. Bond, who is really Butterworth & Co., evidently decided, prior to the 13th November, 1912, that, thereafter he would, by his one-man company to be formed for that and other purposes, sell the said publication practically direct in what had been the previously admitted territory of the Canada Law Book Co.

On the 13th of November, 1912, and as soon thereafter as physical conditions and the capacity of the Winnipeg post office would allow, for the purpose of procuring orders within the territory previously granted to the Canada Law Book Co., Butterworth & Co. (Canada), Ltd., acting under instructions of Bond and the English house, mailed from Winnipeg many circulars offering an India paper edition, "For a short time only," of the said work, at a price less than that at which the thick paper edition was being sold, and afterwards mailed many other "follow up" and other circulars, all for the purpose of soliciting orders. Such circulars did result in many orders for Halsbury coming to Butterworth & Co. (Canada), Ltd. If the contract is alive, I think Butterworth & Co., which is really Butterworth & Co. (Canada), Ltd., has committed a breach thereof, and I do not think that Butterworth & Co. (Canada), Ltd., if the contract is alive, can escape liability.

The plaintiff laid its claim contending that its contract with the defendant Butterworth & Co. is a contract extending for a period of five years from the date of publication; that the work is a complete work, subscribed for and sold only in sets, and that it is not "published" until the last volume is issued. In the alternative, it is said that if it has not such contract, it has a contract for at least one year from the date of the publication of the final volume. The plaintiff claims an injunction to restrain the defendants from soliciting orders within its territory, and damages for breach of the contract.

With great reason, he says it never was intended that his sole right to sell would cease before the completion of the work. Were it not for the "overleaf" accompanying the letter of June 14th, I could easily follow the plaintiff's contention. Certainly prior to the date of that letter Mr. Bond recognized that the contract should continue until a period after the publication of the last volume. While his memorandum "overleaf" may seem at variance with that conclusion, still, I fail to understand how he could expect any offer to be accepted or considered reasonable where the term would expire before the final completion of the work.

The defendant denies the contract.

At the trial I allowed an amendment setting up the fourth section of the Statute of Frauds. During the progress of the trial various applications for amendment were made, some of which I refused. As the trial proceeded, however, it became apparent that all the material evidence was at hand, and I intimated to counsel that if, upon consideration, I considered any amendments to either the statement of claim or defence were necessary to grant proper relief, I would allow the necessary amendments.

I allow the plaintiff such amendments as are necessary to set up in the alternative, the contract as one for five years, with a right of renewal, the plaintiff by his counsel having offered to take the required number of sets. I also allow the plaintiff to set up waiver and claim for equitable relief.

I allow both the plaintiff and defendants to set up pleas of estoppel.

I allow all the amendments both of the plaintiff and defendants attached to the record.

The defendants say that the contract is a contract for the sale of goods and is not to be performed within a year; that there is no sufficient memorandum; that part performance does not take the case out of the statute, citing for this proposition, *Prested* v. *Garner,* [1910] 2 K.B. 776. It was there held that the 4th section of the Statute of Frauds was not repealed by the Sales of Goods Act, and therefore, that in such case part performance as set forth in section 6 of our Sales of Goods Act does not avail. This principle was recognized without discussion on appeal: *Prested* v. *Garner,* [1911] 1 K.B. 425. The defendants also say that there was no *consensus ad idem;* that if there is a sufficient memorandum it does not embody the mutual understanding; and that there is consequently no contract.

Of course, were the facts and circumstances similar, I would have no hesitation in applying the principle laid down in *Prested* v. *Garner,* but, while expressing no opinion on the application of that case here, I think there are many circumstances in this case which would tend a Court of Equity towards a different conclusion. It is true that in *Prested* v. *Garner* there was part performance; but how? By a shipment of a certain portion of a lot of carburetors. Each of these carburetors is a complete article in itself. The balance of the lot of carburetors, I think I may safely assume, were for sale upon the open market and the deficiency would be easily replaced, while here the work is copyrighted and cannot be procured elsewhere. Then Butterworth & Co. knew the plaintiffs would, in the ordinary course of business, incur obligations with its customers to provide them with the complete sets, and that the remaining volumes could be procured only from Butterworth & Co. Not only with the knowledge, but with the consent and assistance of Butterworth & Co., the plaintiffs did proceed as though there was a contract, sold more than the 400 sets before

the expiration of two years and many hundred sets since, all of which sets were supplied by Butterworth & Co. at the price per volume mentioned in the correspondence. The contract was treated by both parties as a contract for the agency of a copyrighted publication.

Would a Court of Equity now hear the defendants say, "There is no memorandum"? Having regard to the portions of the correspondence already set forth, the mass of correspondence following during the next five years, the circumstances of the case and the conduct of the parties, who at all times acted during the whole five years as though there were an enforceable contract, I think I must find there was a contract.

It is true Mr. Cromarty did not see the letter of June 14th, 1907, nor its accompanying "overleaf" until the spring of 1912. But, had he seen those writings when they arrived, and if they contained a variation, could he have sat quietly by and now be heard to say that any variation therein expressed did not become a part of the contract. Surely after five years, if any variation were set forth in a way a reasonable man should understand, he could not now say, such is not a part of the contract. Is he in any better position because he did not see those writings? I do not think so. It was through no fault of Butterworth & Co. that Mr. Cromarty did not see either this letter or the "overleaf." I think that now the plaintiff may not be heard to deny that the variations, if any, mentioned in the "overleaf" became a part of the contract, and that the plaintiff must, by its conduct, be precluded from denying that it accepted any variation therein expressed.

It is not shewn on what date the first volume was published. Mr. Bond said some time in November, 1907. In the defence it is stated as November 14, 1907. As against the defendants, I think this may be taken as correct.

It appears that the sets supplied at 7s. 6d. per volume were unbound and printed on thick paper. Butterworth & Co. had issued an apparently limited number of sets printed on India paper. These sets were more attractive. The plaintiff kept

continually asking for such sets, and some were from time to time supplied, bound and at a higher price. Mr. Cromarty from time to time unsuccessfully urged Butterworth & Co. to print a further edition on India paper. Some Canadians wrote direct to London to the defendant Butterworth & Co. for India paper sets, and Butterworth & Co. replied stating that they could not supply them, and referring such applicants to the plaintiffs, whom Butterworth & Co. said were their sole agents. Butterworth & Co. sent copies of such correspondence to the plaintiffs. Evidently there became an increasing demand for the India paper sets. On January 6th, 1911, Butterworth & Co. wrote, "but it would be too expensive to reprint from moulds specially for the purpose of making up the stock of India paper editions. Under the circumstances there is no other course than to wait until a later date when we may be able to reprint a thick paper edition." On January 18th, the plaintiffs wrote wanting a price on 100 sets India paper edition, and later got 2 sets. Butterworth & Co., on February 10th wrote saying they could not spare more, and saying further: "If we are so fortunate as to be able to reprint the India paper edition in a few years, then it will serve as an extra attraction to those few benighted people who have not taken up the work, supposing there are any such."

Before November 12th, 1912, Mr. Bond appears to have made up his mind to go into business in Canada himself, not only to sell Halsbury, but to sell other goods in competition with the plaintiff. It is true he formed a one-man company; but can I come to any conclusion other than that Bond and Butterworth & Co. and Butterworth & Co. (Canada), Ltd. are one and the same thing, and that the limited company was thought by Bond either better for business reasons or perhaps safer in case of litigation with the Canada Law Book Co.?

Notwithstanding his repeated assertions to Cromarty that there would be no India paper edition for years, in the face of those assertions, and under the circumstances, I think, while he was making those assertions, he was preparing such an edition

and preparing to advertise and sell these at reduced rates, "For a short time only" on what he says he thought was the very eve of the contract with the plaintiff.

Who came to Winnipeg and arranged for the lease in his name, bearing date November 1st, 1912? That is not shewn, but I think I may assume someone was here on his behalf. When did he install his one-man company in those premises? It is not shewn, but surely it was before November 13th, 1912. When did he prepare those circulars? Surely long before November 13th, because, having been previously printed in England, they were then here; cart-loads of them, so many cart-loads that the Post Office could not, apparently, receive them all on one day. When did he commence to get ready his India paper edition? If I exercise any common sense, I would say long before November, 1912.

But it is not until he sends a letter bearing date November 6th, by way of mail, to the plaintiff at Toronto, that he says a word about his intention to himself come into the territory. Then he writes: "We are writing to say that on the 14th of this month, we open an office in Canada," giving the Winnipeg address. Still no word of the India paper edition. Let us see what happened. I cannot do better than copy a portion of the letter of November 16th from the Winnipeg office to the London office of Butterworth & Co.

Letter of Notification.

> We have by this mail posted to London several copies of the above. On Wednesday, the 13th, we posted to the profession as many as the Post Office would allow. The balance were despatched on the 14th. If we have time we will explain our reference to the Post Office. The Government organization here is certainly the hardest case that we have ever had to deal with.

Book of the Laws of England.

> Having regard to the possibility of activity in certain directions, we had decided, prior to the receipt of the personal letter to Mr. Bellew, to expedite the posting of the above. You will recollect that the original arrangement was for them to be posted on Saturday, the 16th. We, however, arranged to post the packets for Winnipeg on the night of the 14th, and the balance were taken away in four cart-loads on the 15th.

In passing, we think it well that you should become acquainted with what we have had to go through in connection with this matter. In the first place, the staff here had to paste on the title page and the order form (two operations). Secondly, they had to insert the red special offer slip, and an envelope; thirdly, the pamphlet had to be inserted in the envelope; fourthly, each packet had to be stamped "Butterworth & Co."; fifthly, a special number of "cancelled" stamps had to be procured in order to expedite the delivery of the packets. In the next place, as the Post Office decided it was too large a quantity for them to handle immediately, our staff here had to sort the packets into various postal districts, tie them up in special bundles, and make four journeys with the cart, to which we have already referred, to the C.P.R. mailing depot, where arrangements were made for them to be put on the respective trains. We may say that one of the clerks was so amazed by such a quantity of stuff being delivered to them at once that he has asked for a copy of the pamphlet in order to keep it as a memento.

We have not set out this information merely to shew you that we have had some trouble in connection with the matter here. We include it in this letter because it is an important fact to take into consideration in the future. The Post Office here is not equipped to handle expeditiously in any event large quantities of either circulars or advertising matter sent to them from one firm. This does not, of course, raise an insuperable barrier in the way of future advertising, but it does put upon the office here a good deal of the burden that is borne by the Post Office in every reasonable country. From our experience of the country it is better for matter to be posted in Winnipeg rather than in London; but when arranging advertising campaigns you must be good enough to take all the facts set out in this section of the letter into consideration. Unless we had actually been through the experience of the last week we should not have believed it possible that such an organization, going under the name of the Post Office, could have existed in any modern country.

Now that the *Book of the Laws of England* is on its way over the country, we feel that we have got rid of one of the most important of our early tasks. We expect, within a few days, to have quite a fair correspondence as a result of the prospectuses being sent out. As a matter of fact, we have had two or three enquiring callers at the office to-day. We have also received our first letter in connection with the matter. When we write our next letter we hope we shall be able to say we have secured our first batch of orders. Some time must elapse, however, before it is possible for letters to reach us from the profession, either in the east or the west. There is, apparently, no standardized time for the transit of letters from one place to another. In any event, however, at the end of next week our letter box should be busy.

Laws Prospectuses No. 2.

Having regard to the possible activity already referred to in the previous section, we have also decided to expedite the despatching of the "follow" pamphlet, a stock of which has safely arrived. Another reason that we have decided upon this course is that it strikes us there may be a good chance of it being even more impressive than that beautiful production, *The Book of the Laws of England.* In our opinion it is one of the best advertising prospectuses that has so far been issued by the London house. It gives fresh glory to the premier legal work; it emphasises its utility, and shews that the *turn over edition* gives the work a value which up to the present has not existed. If our letter box does not commence to be put to good use, say a week after the despatch of this *"follow,"* we are not at all sure that there will not be some grounds for our coming to the conclusion that something has gone awry with the Dominion.

Our Representatives.

We met Messrs. Wood, Dalziel and Lightfoot at the depot at 1.15 Thursday morning. They did not seem surprised, even at that early hour, to be met by someone from London. They all struck us as being depressed, and they certainly had not many pleasant recollections with regard to the journey. They apparently wished to stay here a few days in order to get some washing done, and to settle down to the country, or some such nonsense. We, however, despatched them as follows by the 10.40 train to the west, leaving the night they arrived.

Mr. Dalziel has gone to Regina, and we hope he was able to commence work there yesterday.

Mr. Lightfoot starts—if he carries out our instructions—in Calgary on Saturday morning; and Mr. Wood should be fit and ready on Monday morning.

We have arranged for them to telegraph us a "night letter," as we mean to keep in close touch with them.

The Laws of England, "Turn Over" Edition.

We were glad to learn that you have shipped 100 sets of the first ten volumes of the above. We expect these will arrive in Montreal about the end of the month. As we informed you in our previous communication, we will see that Mills has very explicit instructions with regard to the disposal of these. We hope you gave special instructions to the packers with regard to the wrapping and packing of the cases containing the ten volumes. Our reason for specially mentioning this is that a number of the volumes in the representatives' specimen cases appear to have got rather damp, and, as a result, the leather is somewhat marked. We cannot say very badly marked, but the examination of the travellers' sets already referred to revealed the necessity for special care to be taken in the matter of packing. If Messrs. Wingate & Johnston have attended to this matter with the

corresponding care with which they packed the ordinary stock, we have no doubt the volumes will arrive at Montreal in quite good condition. The sets you are now sending out from England will, moreover, have greater protection than the travellers' sets referred to, as they are to be enclosed in a strong outer case. . . .

The defendants knew that the plaintiff was active in securing subscriptions and had the right to be active in doing so until the last moment. It is true that Bond did not know of Cromarty's oversight of his "overleaf" letter, for Cromarty had said nothing of it. Must I therefore assume that Bond thought his contract expired on the 13th of November, or was it a case in which he himself was uncertain? What was the "possible activity in certain directions" referred to in the letter of the 16th November from the Winnipeg office to the head office, not once, but twice, and in such a way that I can have no doubt but that both Bond and his Winnipeg representatives expected there would be activity? Was it that they did expect that the Canada Law Book Co. would not tamely submit to the termination of its contract on the 13th of November? Did they expect that, unless they could get their circulars out by the cart-load and at once, they might be stopped? Why is it that the Winnipeg office finds so much fault with the Winnipeg post office accommodation? Surely it is because the circulars which they attempted to send out were so numerous and bulky as to be extremely unusual. I say again, why was there necessity for such haste?

The Canada Law Book Co. had been active in securing subscriptions. Butterworth & Co. had a register upon which was entered the subscriptions, and the date of entry, at London. During this very month of November the Canada Law Book Co. had ordered, in the usual way, apparently, 100 sets. Did Mr. Bond think that his circulars would have any effect upon these 100 subscribers, and upon the many other various recent subscribers? Did he think that those who were getting the thick paper edition would cast longing eyes upon the India paper edition? Did he think that he was dealing fairly with his Canadian customer, the Canada Law Book Co., when, know-

ing the price at which, during the whole five years, "Halsbury" had been sold in the thick paper edition, he, at the crack of dawn, floods the market with cart-loads of circulars, advertising for sale, at a less price, "For a short time only," the far more attractive India paper edition, by a rival Law Book Company formed to sell this and other law books.

Mr. Bond may consider that good business. He may consider it honourable business; but to my mind it is not commendable.

The contract was made before the publication of the first volume. Let us see what was in the minds of the parties, or in the mind of Cromarty on the one hand, and Bond on the other. Bond intended to give, and Cromarty to take, the sole agency for a term of years. Both Bond and Cromarty thought the work would be finally completed before five years. Having regard to the nature of the work and the consequent contracts that the plaintiff would make with its customers I must find that Bond intended (when he made the contract) that the plaintiff would have the sole agency, at any rate until the final completion of the work. I do not think any other thought was then in the mind of either party. During the subsequent correspondence the plaintiff urged haste, suggesting two years.

On the strength of the circular before mentioned (complete in 18 to 20 volumes) the plaintiff opened correspondence for the exclusive agency. For what? Surely for the complete sets. Then followed Robinson's interview and the memorandum given to him by Bond to deliver to his principal, the plaintiff. Does the subsequent correspondence change the conditions set forth in that memorandum? In some respects its conditions are expressly varied. But in some respects not. In view of the common intention as to the plaintiff's right to an exclusive agency until completion of the publication, does the term in the "overleaf" so vary the contract that Bond may now say, "although I have taken longer to complete the sets than either of us contemplated, and although that is my fault, now, because five years have expired, you have no contract."

When we look at the original memorandum we see, "For five years from the publication of Volume 1, or for one year after publication of the last volume of the set, whichever shall be the longest period."

After working for five years under the contract, the defendants now say the term as to time means one thing and the plaintiff says it means another. I think, in so far as the defendants are concerned, it looks as though they are trying to take advantage of the wording of the "overleaf" to work out an afterthought and something not in the mind of Mr. Bond when he sent the cable and wrote the letter following. Parties may well be fairly agreed upon the terms of a contract when it is made and get wide apart as the years go on as to the interpretation of its terms.

While I am not prepared to follow the plaintiff's contention as at first laid, I think there is strong ground to support it.

As the parties cannot now agree, let us look at the correspondence and see if we cannot find a contract.

It is strongly urged by the defendants that I must not look at the Robinson memorandum. I cannot support this contention.

> Where one document refers to another, the two may be read together so as to constitute a complete memorandum. . . . The same rule applies if the documents can be connected together by a reasonable inference, although there be no express reference from one document to the other: Halsbury, Vol. 7, 369.

The law is fully reviewed on this point in *Bristol, etc., Aerated Bread Co.* v. *Maggs*, 44 Ch. D. 620.

When I look at the whole correspondence to gather the terms of the contract, I am deeply impressed with the fact that the memorandum given to Mr. Robinson, which was the first writing of any moment, is an essential part of the contract. It is true that Cromarty makes certain propostions in his letter of the 21st of May, 1907; but he has the written proposition before him when he writes that letter and refers to it in that letter. When I look at the cable of the 13th of June and the letter of the 14th of June, and also the "overleaf," and compare this with the

letter and with the original memorandum, I think I may safely say that, except wherein that original memorandum handed to Mr. Robinson is varied, its contents become and are a part of the contract. .

Let us assume for the moment that the defendants are right in their contention that the term was varied by the "overleaf." Even so, the renewal clause remains a part of the contract.

But if the defendants are right in their contention that the contract expired in five years, whether they completed their publication or not, then it may be urged that the defendants not having elected to renew within the term, may have lost that right. I have been referred to no authority on this point. I think I may refer to the law regarding leases:—

> A lease which creates a tenancy for a term of years may confer on the lessee an option to take a lease for a further time . . . and its exercise is not necessarily restricted to the duration of the original term: Halsbury, Vol. 18, 845.
>
> Where a lessee for a term of years has the option to renew his lease, it seems to be the better doctrine that he must notify his lessor before the term expires whether he elects to renew, as the lessor should know at the moment when the lease expires whether he has or has not a tenant. . . . A court of equity will not relieve the lessee against a failure to give the required notice if such failure was caused by wilful ignorance or accident not unavoidable. If, however, the failure to give the notice was caused by unavoidable accident, fraud of the lessor, surprise or ignorance not wilful, a court of equity should grant relief and compel renewal. . . . The lessor may also be bound by a waiver. . . . : 18 Am. & Eng. Encyc., 2nd ed., 692.
>
> Courts of equity will relieve a lessee if he has lost his right to renew by fraud on the part of the lessor or by unavoidable accident on his own part. They will not assist him where his failure to renew is on account of his own gross laches or negligence. On the other hand, it is held that on the question of the right to relief against a forfeiture for failure to renew time is not essential where there is mere neglect, but that in the case of gross or wilful negligence relief will not be granted: 24 Cyc. 1006.
>
> A provision in a lease giving to the lessee the privilege of extending the term is to be distinguished from a provision giving to the lessee the option to renew. In the former case no notice of the lessee's election to extend the term is required, in the absence of a stipulation therefor in the lease, his mere remaining in possession being sufficient notice: 18 Am. & Eng. Encyc., 2nd ed., 693.

The provisions of a lease requiring notice from the lessee of an election or intention to renew or extend the term are for the benefit of the lessor and, therefore, the notice itself or any other matter going to the sufficiency thereof may be waived: 24 Cyc. 1003.

It may be said that the case is not analogous; but I think the Court here should adopt a similar principle. It is true that a tenant remaining in possession gives an evidence of some intention. Here, considering the conduct of Bond and his Winnipeg office, and especially in view of the contemplated "activity in certain directions," I have no doubt that the defendants were fully aware of the stand the plaintiff would take as to the contract.

I think the defendants made all their preparations well knowing they would surprise the plaintiff. I think they succeeded in springing a surprise. Under the circumstances I fail to see in what better position the defendants are to complain of lack of election than would a lessor in any of the cases cited above. I think here the defendants had no right at all to invade the territory as they did.

I think the plaintiff is entitled to a renewal of his contract upon the terms mentioned in that memorandum. I do not think the defendants may offer for sale the India paper edition in the territory granted.

It was agreed at the trial that if I found the defendants had no right to invade the territory, I might assume damage, and that in such case there would be a reference by consent to an arbitrator to be agreed upon or to be appointed by me under the law in that behalf.

I reserve the matter of the appointment. If the parties cannot agree I will appoint the arbitrator.

There will be an injunction as prayed.

Having regard to the amendments, I allow no costs.

Judgment for plaintiff; injunction ordered.

A. B. Hudson and *H. E. Swift*, for plaintiffs. *C. P. Fullerton*, K.C., and *C. S. Tupper*, for defendants.

LORD MACNAGHTEN.

We regret to record the death of Lord Macnaghten, who died on the 17th ulto., at the age of 83. He was the second son of Sir Edmund Macnaghten, a member of an ancient Scottish family, long settled in Ulster, which has given to the country both distinguished lawyers and soldiers. His grandfather was an Indian judge, and his uncle one of the law reporters in Chancery.

Lord Macnaghten completed his education at Trinity College, Cambridge, where he won distinguished honours. He was as well known as an athlete as he was as a scholar and a judge. Among his rowing trophies are the Colquhoun Sculls and the Magdelene Pairs, with F. W. Johnstone, in 1851. In 1852 he rowed for Cambridge against Oxford and also won the Diamond Sculls. At the Henley Regattas his well-known figure was almost always to be seen in a certain corner of the grand stand.

Early in his career Lord Macnaghten was offered a judgeship by Mr. Gladstone, but declined to leave the Bar; and, on a subsequent occasion, he refused the position of Home Secretary. In January, 1887, however, he succeeded Lord Blackburn as a Lord of Appeal in Ordinary. In 1903 he was created a G.C.M.G. and a G.C.B. in 1911. Two of his sons are members of the Bar.

As a judge Lord Macnaghten may be classed as amongst the very best of those eminent men who have adorned the British Bench; and it has been said, "Whilst his pronouncements in the House of Lords are amongst the most learned of the judgments of that august tribunal, they fairly sparkle with flashes of humour and gems of thought." He was equally distinguished in the many judgments he has given in the Judicial Committee of the Privy Council, and all parts of the Empire have been benefited by his mastery expositions of the law as it affected important interests in England's overseas dominions and dependencies.

TRADE UNIONISM.

Recent developments in the system of trade unionism have brought into the government of the country a new force, of which it would be well for our legislators and statesmen to take very earnest heed. The amalgamation of all the unions connected with the work of the railways in the United Kingdom, which has long been talked about, has now been accomplished, and the absolute control of its 200,000 members is placed in the hands of a council of twenty-five of its leaders. To this body is given the power of calling on, or calling off, a strike of the whole body of railway employees for any cause whatever without consultation with the men or notice to the companies. It is hard to realize the consequences of interference with the means of transportation in such a country as England, where a dense population is dependent not only for its comforts, but for its daily bread upon the daily supplies which the railways bring to its doors. Nor is it the capitalists with whom the trades unions are at war who will be the first or principal sufferers by such an act of hostility. It is the very poor whose daily wage is cut off, and whose daily modicum of food and fuel can no longer be obtained —who have no reserve upon which they can draw either of money or provisions—who will first feel the pinch of privation. Nor is it the men who may properly be held responsible for such extreme measures who will feel their effects most severely—still less the leaders, who, it may be assured, have taken good care of themselves; it is the wives and children, the aged and infirm, who cannot feel the joy of conflict which may for a time sustain those engaged in the combat, but who must endure in silence whatever may befall.

But it will be said, Surely such a power as this council possesses will not be exercised except to right some grievous wrong for which redress has been refused, or to obtain some benefit wrongfully withheld. It will not be put in force for anything less than some vital issue which affects the whole body concerned and which cannot be settled in any less violent manner.

Will it not?

A short time ago a man in the employ of one of the English companies was suspended for drunkenness, of which he was convicted by the resident magistrates. Though this was before the amalgamation above spoken of a strike was threatened unless the man was reinstated, a strike which would have affected a large body of workmen, and, of course, tied up railway trains over a large section of country. To compel the company to replace in charge of a locomotive a man whose sobriety could not be relied on could not be thought of, so the complaint made was that the man was wrongfully convicted of intoxication. The matter was becoming so serious that the Home Secretary was appealed to. He sent another magistrate to try the case, and he finding the evidence insufficient dismissed the case, and the company then yielded and reinstated the man. Whoever was wrong in this matter—the magistrate who convicted, the magistrate who acquitted, the Home Secretary, who interfered with the regular course of justice, the company who first dismissed and then reinstated, or the trade union which, on such questionable grounds, were ready to inflict untold injury upon a mass of persons who were in no way concerned in the dispute—we have the fact that the trade unions are prepared to use their enormous power for mischief for causes the most trivial and which ought to be capable of settlement without recourse to such dangerous weapons.

We have now a case arising since the amalgamation when a strike which would have involved the whole of the railway systems throughout the British Islands was threatened on account of the dismissal of a conductor on the Midland Railway. Unwilling, we may suppose, to incur responsibility for such a calamity as was threatened the company yielded and reinstated the man.

Now, whether the company were right or were wrong in their action, we see here that the council of twenty-five were ready to exercise their power, and close up every railway in the country, regardless of consequences, for a matter so trivial, and which could and should have been adjusted as such difficulties are adjusted in every other sphere of action.

Apart from all other considerations, how is it possible for a railway company to maintain the discipline necessary not only for its own efficiency, but for the safety of the public for whom it is responsible with such a tremendous irresponsible power ever ready to intervene in any case, no matter how unimportant, in which the interests of a union may be affected?

On this continent also an effort is being made to concentrate the power of all the unions in one body so that when a dispute arises, or a demand is made, the threat of a general strike will strike terror into the whole community. The tyranny of Democracy may become as effectual in its operation and as far-reaching in its consequences as that of the most powerful and unscrupulous despotism that ever existed.

SIR JOHN BARNARD BYLES

is a conspicuous instance of the truth of Hill Burton's remark that to achieve posthumous fame, counting recollection as the equivalent of fame, a man should write some solid book. Byles attained a considerable position both at the Bar and on the Bench —he was an astute advocate and an able and painstaking Judge— and yet no one will deny that but for the fact that he wrote an excellent book the majority of the present generation of lawyers would scarcely recall his name.

Some of the older members of the profession may, indeed, remember the story of his sorry horse which the wags of the Temple christened "Bills," remarking, when they saw its owner on its back, "There goes Byles on Bills"—the same horse which, according to another tradition, Byles and his clerk named "Business," so that when the former, as was his wont, went out for his afternoon's ride, his clerk could, with a clear conscience, declare, in answer to the inquiries of a too inquisitive client, that the serjeant had "gone out on Business." Others may recall the anecdote which tells of Byles putting the question to counsel, who was arguing a case on sec. 17 of the Statute of Frauds, "Suppose I were to agree to sell you my horse, do you mean to say

that I could not recover the price unless—" "My Lord," was the instant reply, "the section only applies to things of the value of £10"—a retort keenly appreciated by all who had seen the Judge's steed. Or, again, a few may remember how Byles, even a stickler for the punctilious observance by counsel of the strictest orthodoxy in the matter of dress, administered this reproof to the late Lord Coleridge when at the Bar: "Mr. Coleridge, I never listen with any pleasure to the arguments of counsel whose legs are encased in light grey trousers."—*Law Times.*

PRINCIPAL'S LIABILITY FOR AGENT'S FRAUD.

It is scarcely possible to overrate the importance of the decision of the House of Lords in the recent case of *Lloyd* v. *Grace, Smith & Co.*, 107 L.T. Rep. 531, not only to solicitors—the class of employers which, of course, it primarily affects—but also to all other persons who stand in the relation of principal to agent. When it is seen from the headnote to our report what that decision was, it will be recognized how far-reaching may be its consequences: "An innocent principal is civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud, even though the principal has not profited in any way by the fraud." The concluding phrase comprises the essential part of the proposition of law. For in the Court of Appeal a difference of opinion arose by reason of the words "for the master's benefit" in the judgment of the Exchequer Chamber in the oft-cited case of *Barwick* v. *English Joint Stock Bank*, 16 L.T. Rep. 461, L. Rep. 2 Ex. 259. That judgment was delivered by Mr. Justice Willes on behalf of himself and the six other learned judges of which the court consisted. And the principle as there enunciated was in these terms: "The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." Lord Justice Farwell, in giving judgment in the Court of Appeal in *Lloyd's* case (*ubi sup.*), laid the utmost stress on the words "and for the master's benefit."

His Lordship considered that neither that nor any other court could overrule Mr. Justice Willes' statement of the law, or qualify it by striking out those words. The learned judge referred to a number of authorities in which the law had been stated in the same terms, adding that the principal's liability did not extend to cases where the agent acted for or with a view to his own benefit to the exclusion of that of the principal. Lord Justice Kennedy expressed his concurrence in that opinion; but Lord Justice Vaughan Williams dissented therefrom. Without going so far as to say—as was argued in *Lloyd's* case (*ubi sup.*)—that in no case of wrongful conversion or fraudulent misrepresentation is a master liable for the act of his servant, the impression certainly appears to have got about that a fraudulent act committed by an agent for his own illegal purposes, even though in the ordinary scope of his authority, does not render the principal in any way responsible. That is unequivocably shown by what was said in several reported cases—notably by Lord Justice Bowen in *British Mutual Banking Company Limited* v. *Charnwood Forest Railway Company*, 57 L.T. Rep. 833, 18 Q.B. Div. 714, and by Lord Davey in *Ruben and Ladenburg* v. *Great Fingall Consolidated Company*, 95 L.T. Rep. 214, (1906) A.C. 439. The House of Lords, however, in *Lloyd's* case (*ubi sup.*), sturdily brushed aside all dicta of that description; utterly exploding the notion that the fraudulent act of the agent must be to the principal's personal advantage. Mr. Justice Willes, said Lord Loreburn, "cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud. Nearly every rogue intends to do that." Lord Halsbury, it will be noticed, was equally emphatic in the view that he expressed, remarking that the words "and for the master's benefit" obviously meant that it was "something in the master's business." His Lordship referred to what was said by Lord Holt in the ancient case of *Hern* v. *Nichols*, 1 Salk. 289—namely, "that the merchant was answerable for the deceit of his factor, though not *criminaliter* yet *civiliter*." With Lord Macnaghten's exhaustive judgment reviewing the authorities, the position is made even more distinct, that the circumstance that a principal does not benefit through the fraudulent act of his agent is entirely im-

material. It is, indeed, difficult to conceive any case in which he could so benefit where "no express command or privity of the master be proved." It would be a singular sort of agent so zealous in his principal's interests as, without his knowledge, to be guilty of fraud in order to forward the same.—*Law Times.*

THE NEW LORD OF APPEAL.

The appointment of Mr. Justice Parker to be a Lord of Appeal is an excellent one. He will be a fitting successor to the late Lord Macnaghten, with the same scholarly intellect and the same accurate knowledge of law. As a judge of first instance, Lord Parker has displayed all the best attributes of that office in a pre-eminent degree. Whilst alert, he seldom interrupted, and, though learned, he listened with patience to the arguments of those less gifted than himself. His many admirable judgments speak for themselves. He will be a valuable addition even to the august tribunal to which he has been promoted. It is some time since the House of Lords as an appellate tribunal has been as strong as it is at the present time. It is only necessary to mention the names of the Lord Chancellor (Viscount Haldane), the Earl of Halsbury, Lord Moulton, and the new Lord of Appeal, several of whom have a reputation far beyond this country.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

MORTGAGE OF PERSONAL PROPERTY—FORECLOSURE—SERVICE OUT OF JURISDICTION—RULE 64 (E)—ONT. RULE 162 (1) E.

In *Hughes* v. *Oxenham* (1913) 1 Ch. 181, the action was brought to foreclose a mortgage of personal property. The mortgage was made within the jurisdiction, and all the parties resided there when it was made, but the defendants were when the action was brought resident in Australia. The defendants applied to discharge the order allowing service out of the jurisdiction. The question turned on whether or not the action was founded on a breach of contract to be performed within the jurisdiction within the meaning of Rule 64 (*e*)—Ont. Rule 162 (1) (*e*). Neville, J., held that it was, but the reporter inserts a slip in the report intimating that his decision was subsequently reversed by the Court of Appeal, presumably on the ground that an action for foreclosure is not an action for breach of contract.

SALE OF GOODS—CONTRACT FOR GOODS TO BE MADE—BREACH OF CONTRACT BY PURCHASER—MEASURE OF DAMAGES.

In re Vic. Mill (1913) 1 Ch. 183. In this case the claimants entered into a contract with a company now in liquidation to sell the company certain goods to be made by the claimant; the company went into liquidation, and the liquidator refused to accept the goods—and the simple question was, what was the proper measure of damages provable by the claimants in the liquidation proceedings, and Neville J. held that as there was no available market for the goods in question, which were machines of a special character, the proper measure of damages was the loss of profit sustained by the claimants through the contract not being carried out.

PRINCIPAL AND SURETY—RIGHT OF PRINCIPAL TO INDEMNITY—RELEASE OF DEBTS BY WILL—CONSTRUCTION—"DEBTS".

In re Mitchell, Freelove and Mitchell (1913) 1 Ch. 201. In this case a testator made his will whereby he bequeathed to his nephew J. J. Mitchell £2000 and forgave him all debts "owing to me from him up to the time of my decease"—The testator was surety for J. J. Mitchell to a Bank for a loan made by the

Bank to Mitchell. No claim had been made against the testator in respect to this suretyship, but after his death a claim was made by the Bank against his estate for £4000 and the executors paid £3100, part of the amount claimed, and the present proceeding was for the purpose of determining whether notwithstanding the release of debts, the executors were entitled to deduct the amount so paid from moneys coming to J. J. Mitchell out of the estate. Parker, J., held that until a surety had paid something under his guarantee there is no debt at law, but only a right to go into equity to compel the principal to indemnify the surety against the liability. Therefore he held that the release of debts did not bar the right of the executors to retain the legacy payable to J. J. Mitchell in order to make good pro tanto what they had paid the Bank.

DENTIST—UNREGISTERED PERSON ACTING AS DENTIST—NAME OR TITLE OF DENTIST—DESCRIPTION IMPLYING THAT A PERSON IS REGISTERED—DENTISTS ACT, 1878 (41-42 VICT. c. 33), s. 3——(1 GEO. V. c. 39, ss. 18, 25, ONT.)

Robertson v. *Hawkins* (1913) 1 K.B. 57. The defendant in this case was neither a registered dentist nor a duly qualified medical practitioner, but carried on dentistry, and was applied to by the plaintiff, who was in the employment of a municipal council and whose teeth were defective, for a certificate that his teeth were in a satisfactory state. He told the defendant he was required to get a certificate from a registered dentist, and produced a paper containing the requirements, which the defendant read. The defendant examined the plaintiff's teeth and extracted some, and assured him that he had given hundreds of such certificates to the Post Office, and that he would give the plaintiff the certificate required, when he returned on a subsequent day to have his teeth finished. The defendant did not at any time, either in writing or orally, state that he was a "dentist" or "a registered dentist," or state that he was a person specially qualified to practise dentistry, nor did he, in fact, give the required certificate, and the magistrate refused to convict. The Divisional Court (Lord Alverstone, C.J., and Channell and Avory, JJ.), however, held that the defendant had committed an offence, and that when he was informed by the plaintiff that he required the certificate of a registered dentist, what the defendant did was, in fact, to hold himself out as being a registered dentist competent to give the required certificate, and the case was, therefore, remitted with a direction to convict.

RESTRAINT OF TRADE—AGREEMENT BY EMPLOYEE NOT TO BE ENGAGED IN ANY OTHER BUSINESS LIKE OR SIMILAR TO EMPLOYERS—AREA OF RESTRICTION—REASONABLENESS—INJUNCTION.

Provident Clothing Co. v. *Mason* (1913) 1 K.B. 65. The plaintiffs in this case claimed to restrain the defendant from committing a breach of an agreement not to enter into or be engaged in any other business like or similar to that of the plaintiffs, his employers, "within twenty-five miles of London," where the plaintiffs carried on business. The evidence showed that the area of restriction was not wider than was reasonably necessary for the plaintiffs' protection, and the Court of Appeal (Williams, Buckley, and Kennedy, L.JJ.) therefore held that the plaintiffs were entitled to an injunction restraining the defendant "from carrying on the same or a similar business to the plaintiffs, within 25 miles of London, where the plaintiffs carry on business, and reversed the decision to the contrary of the Divisional Court (Pickford and Avory, JJ.).

RAILWAY—CARRIAGE OF GOODS—DELIVERY OF GOODS DELAYED BY STRIKE—PERISHABLE GOODS—SALE OF PERISHABLE GOODS BY CARRIER, WHEN JUSTIFIED.

Suris v. *Midland Ry.* (1913) 1 K.B. 103. In this case the plaintiffs had delivered to the defendants for carriage a quantity of butter. Owing to a strike of the defendants' servants for which the defendants were not responsible, it became impossible to deliver the butter, which in consequence deteriorated, and the defendants thereupon sold it for the best price obtainable. The action was brought by the plaintiffs to recover the value of the butter. No time was specified in the contract of carriage for the delivery. The County Court Judge who tried the action held that, as the butter was not delivered at all, the onus was on the defendants to show that the delivery had been prevented by the act of God, or the King's enemies, or the inherent nature of the butter; and they failing to discharge that onus, he gave judgment for the plaintiffs for the amount claimed. The Divisional Court (Ridley, and Scrutton, JJ.), however, held that he was wrong, and that as no specific time had been named for delivery, it must be held that the goods were to be delivered within a reasonable time, and that in estimating what would be a reasonable time the fact of the strike must be taken into account, and therefore as to that point the defendants were entitled to succeed. The parties having agreed

to a settlement, it became unnecessary to decide whether the sale was justified. Scrulton, J., however, expresses the opinion that the rule regulating sales by carriers at sea, applies to carriers by land, and that to justify the sale (1) there must be a real necessity, and (2) it must be impossible to get the owner's instructions in time as to what shall be done.

CRIMINAL LAW—BURGLARY—BREAKING AND ENTERING—KNOWLEDGE OF OWNER OF PREMISES OF INTENTION.

The King v. *Chandler* (1913) 1 K.B. 125. In this case the defendant was prosecuted for burglary in the following circumstances. He made the acquaintance of one Lorie, the business manager of the prosecutrix, and proposed to him a scheme whereby he should rob the prosecutrix's shop. Lorie informed his mistress and the police of the defendant's intentions, and thereafter acted under the instructions of the police, and in pursuance of those instructions he let the defendant have the keys of the premises from which he took wax impressions from which he made false keys. With these keys, on a day arranged with Lorie, he obtained entrance to the premises, and was there arrested by police officers who were on the watch for him. He was convicted of burglary, from which conviction he appealed, and it was contended on his behalf that as the prosecutrix had notice of his intention, the unlocking of the door, though a breaking if done against the will of the owner, was not a breaking in the present case because of the owner's knowledge of the intention to make the entry; but the Divisional Court (Lord Alverstone, C.J., and Channell and Avory, JJ.) held that the knowledge of the prosecutrix of the defendant's intention was no evidence that she assented to his act, and therefore that he had been properly convicted.

INSPECTION OF PROPERTY—"BUILDING IN POSSESSION OF PARTY TO ACTION"—TENANTS IN COMMON.

Coomes v. *Hayward* (1913) 1 K.B. 150, although a case turning upon the construction of a County Court Rule, has a bearing also on the construction which should be placed on Ont. Rules 571, 1096. The Rule in question authorizes the Court to order inspection of property, and for that purpose to authorize persons to enter upon any land. The Judge of the County Court under this Rule made an order for inspection, and authorized an entry for the purpose on certain premises which were held in common, some of the tenants not being before the court, and the Divisional

Court (Ridley and Scrutton, JJ.) reversed the order as being unauthorized in the circumstances.

FATAL ACCIDENT—DAMAGE—CHILD—PROSPECTIVE LOSS—FATAL ACCIDENTS ACT, 1846 (9-10 VICT. C. 93) SS. 1 AND 2—(1 GEO. V. C. 33 S.S. 2, 4 (ONT.)).

Taff Vale Ry. Co. v. Jenkins (1913) A.C. 1. This was an action under the Fatal Accidents Act (9-10 Vict. c. 93), (see 1 Geo. V. c. 33. (Ont.)), by a father to recover damages for the loss of a daughter aged sixteen who was killed by the negligence of the defendants. It appeared that she lived with her parents and was nearing the completion of her apprenticeship as a dressmaker and was likely in the near future to be able to earn a substantial remuneration. The jury awarded £75 damages, for which the judge at the trial gave judgment. The defendants appealed but the judgment was affirmed though the judges were divided in opinion. Williams, L. J., was for affirming the judgment, Farwell, L. J., for dismissing the action and Kennedy, L. J., was in favour of a new trial on the ground that the damages were excessive. The House of Lords (Lord Haldane, L.C. and Lords Macnaghten, Atkinson, Shaw and Moulton), affirmed the judgment, holding that in such cases it is not necessary to show that the deceased was actually at the time of death a source of pecuniary benefit to the party who sues, but that it is sufficient if it is shown that there was a reasonable expectation of pecuniary benefit from the deceased, and their Lordships were of the opinion that the damages were not excessive.

VENDOR AND PURCHASER—SALE OF SHARES—REPRESENTATION—WARRANTY—TEST OF WHAT IS A WARRANTY.

Heilbut v. *Buckleton* (1913) A.C. 30. In this case the House of Lords (Lord Haldane, L.C. and Lords Atkinson and Moulton), reversed both the judgment of the Court of Appeal and that of the judge at the trial. The action was brought by the plaintiff to recover damages for a false representation, whereby he was induced to subscribe for shares in a certain Company which proved a loss. The facts were that the defendants, a firm of high standing, underwrote a large number of shares of the company in question, and directed their agent, one Johnston, to procure purchasers therefor. Johnston brought the company to the notice of a gentleman who had acted as a broker for the plaintiff, and from his office the plaintiff telephoned Johnston—"I understand you are bringing out a rubber company," to which Johnston replied, "yes;"

and to an enquiry whether the company was all right, Johnston replied, "we are bringing it out," to which the plaintiff replied, "that is good enough for me," and in consequence of this conversation became purchaser of a large number of shares in the company. The company was styled the "Filisola Rubber and Produce Estates," and the plaintiff made no further inquiry when apprised of its title before completing his purchase. The jury found that the company was not "a rubber company" and that Johnston had warranted that it was, and judgment was given at the trial for the plaintiff, which was affirmed by the Court of Appeal. Their Lordships however were of the opinion that the judge at the trial erred in leaving it to the jury to say whether or not there was a warranty, because the facts were not in dispute, and it was simply a question of law whether they established a warranty; and their Lordships were of the opinion that they did not; and that it is not every representation made by a vendor that is to be regarded as a warranty, but on the contrary the true test whether or not a representation is to be regarded as a warranty is whether the evidence shows that it was so intended; as Lord Holt tersely puts it, "An affirmation at the time of sale is a warranty, provided it appear on evidence to be so intended." In the present case they found no evidence that the representation of Johnston was intended to be a warranty and the jury having negatived any fraud they held it must be regarded as a mere innocent misrepresentation. The action was therefore dismissed.

EXECUTOR—POWER TO PLEDGE PERSONAL CHATTELS—PLEDGE BY ONE OF TWO EXECUTORS AND TRUSTEES—TRUSTEE—ASSENT TO TRUST OF WILL.

Attenborough v. *Solomon* (1913) A.C. 76. In this case the House of Lords (Lord Haldane L.C. and Lords Atkinson and Shaw) have affirmed the decision of the Court of Appeal (1912) 1 Ch. 451 (noted ante vol. 48 p. 299). The case turned on the question of the validity of a pledge of chattels of his testator made by one of two executors in the following circumstances. The testator after appointing two persons executors and trustees of his will and giving pecuniary legacies gave the residue to his trustees upon trust for sale and distribution as mentioned in the will. All the debts and legacies so far as known were paid and the residuary account was sent in and duly passed within one year of the testator's death. Part of the residuary estate consisted of some plate which was in the possession of A. A. Solomon, one of the executors, and he fourteen years after the testator's death pledged this plate with the defendant Attenborough for a sum which he applied to

his own use. The defendant advanced his money without notice of any trust and supposing that the plate was the pledger's own property. On the death of A. A. Solomon the fact of the pledge was discovered and the present action by the surviving executor and a new trustee appointed in place of A. A. Solomon, was brought to recover possession of the plate. The Court of Appeal held in favour of the plaintiff, and this judgment is now affirmed. Their Lordships hold that A. A. Solomon after the rendering of the residuary account ceased to hold the plate as executor, but must be taken to have assented to the residuary bequest, and thereafter the executors held the residue as trustees, and A. A. Solomon alone was incapable of transferring a legal title to the property. It may be remarked that the defendant did not deal with A. A. Solomon on the faith of his being executor and as such having a right to deal with the goods, but on the assumption that he was dealing with his own property. The case therefore resolved itself into one person advancing to another money on the security of goods supposed to belong to the other, but to which in fact he had individually no title.

CROWN TIMBER ACT, ONT. (R.S.O. 1897, c. 32)—EXECUTION—INTEREST OF TIMBER LICENSEE—EXECUTION ACT, ONT. (9 EDW. VII., c. 47)—ASSIGNEE OF LICENSE AFTER DELIVERY OF EXECUTION AGAINST ASSIGNOR TO SHERIFF

McPherson v. *Temiskaming Lumber Co.* (1912) A.C. 145. This was an appeal from the Court of Appeal for Ontario. The simple question was whether the interest of a timber licensee under the Crown Timber Act, R.S.O. 1897, c. 32, was eligible in execution, and whether the execution creditor is not entitled to enforce his execution as against an assignee claiming under an assignment made after the delivery of the execution to the sheriff. The Judicial Committee of the Privy Council (Lord Haldane, L.C. and Lords Halsbury, Atkinson and Shaw) in reversing the decision of the Court of Appeal lay down the following proposition. (1) That under the Timber License Act the licensee is possessor of an asset in the nature of land (2) that the asset is subject to execution; (3) that the execution does not interfere with the property of the debtor, his power to assign or transfer, subject only to the security of the execution creditor not being impaired; (4) that when there is cut timber on the land on the date of the execution (*quære* delivery of writ to sheriff) that timber is the instant subject of seizure; (5) should timber be cut subsequent to the date (delivery to the sheriff) of the execution it is then instantly attached, and

the execution cannot be defeated, because the timber has been cut by an assignee of the debtor, under an assignment made after the laying on of the execution; and (6) the only exception is in case of a title acquired by a third party in good faith for valuable consideration without notice of the execution. It must be remembered that the execution in question in this case was against both land and goods, and while the writ against lands bound the timber before cutting, the writ against goods bound it immediately it was cut. Their Lordships held that the case was concluded, as far as the liability of a timber licensee's interest being exigible, by the *Glenwood Lumber Co.* v. *Phillips* (1904) A.C. 408, an appeal from Newfoundland, turning on a similar Act to the Ontario Execution Act.

COMPANY—CONTRACT BY COMPANY—ASSIGNMENT BY RECEIVERS OF COMPANY OF CONTRACT MADE BY COMPANY—BREACH OF CONTRACT BY COMPANY—ASSIGNEE OF CHOSE IN ACTION—RIGHT OF SET OFF IN RESPECT OF DAMAGES FOR BREACH OF CONTRACT ASSIGNED.

Parsons v. *The Sovereign Bank* (1913) A.C. 160 is also an appeal from the Court of Appeal, Ontario. The facts were as follows. In a debenture holders' action against a company, receivers were appointed who assigned to the Sovereign Bank a contract made by the company with Parsons et al. for the sale of goods. The contract had not been completely performed by the company, and the purchasers in an action by the Bank claimed the right to set off against the amount payable by them under the contract, the damages which they had sustained by reason of the company's breach of contract. The Judicial Committee of the Privy Council (Lord Haldane, L.C. and Lords Macnaghten, Atkinson and Shaw), held that they were entitled to do this, and reversed the decision of the Court of Appeal to the contrary.

MUNICIPAL ACT, B.C., 1892, S. 146—MUNICIPAL CLAUSES ACT, B.C., S.S. 243, 244—CONSTRUCTION—VALIDITY OF MUNICIPAL BY-LAWS—LIMITATION

Wilson v. *Delta* (1913) A.C. 181. This was an action by a municipal corporation of British Columbia to recover certain dyking dues payable under a by-law. The action was dismissed and the plaintiffs did not appeal. The defendant set up a counter claim, claiming to recover damages alleged to have been occasioned by the carrying out of the work provided for by the by-law. By the Municipal Act, 1892, s. 146, it is provided that a by-law under

which debentures are issued cannot be invalidated on any ground whatever where interest has been paid on the debentures for one year. And by the Municipal Clauses Act, s.s. 243 and 244, a cause of action for deviation for any deviations by the Municipality from the general plan of any public works authorized by the by-law is barred after the lapse of a year from the date when the cause of action arises. These statutes were held by the British Columbia Supreme Court to be a bar to the right of the defendant to recover on his counter claim, and the Judicial Committee of the Privy Council (Lords Macnaghten, Mersey, and Moulton) affirmed the decision. Their Lordships being of the opinion that the deviations in question were incidental to the carrying out of the works and made with a view to diminish unnecessary inconvenience and resulting claim to compensation.

VENDOR AND PURCHASER—AGREEMENT TO GIVE OPTION TO PURCHASE, AND ALSO TO PAY COMMISSION TO PURCHASER—PRINCIPAL AND AGENT.

Kelly v. *Enderton* (1913) A.C. 191. This was an appeal from the Court of Appeal from Manitoba. The case was somewhat peculiar. The plaintiff being owner of land, entered into an agreement to give the defendant, Enderton, an option to purchase the land at a specified price and also agreed to pay Enderton a commission on the sale of $1000. Enderton exercised the option and nominated one Simpson as the person to whom the conveyance was to be made. This was done. The plaintiff subsequently discovered that Simpson was a clerk in Enderton's employ, and brought an action to set aside the sale, claiming that the Endertons were agents and not competent to be themselves the purchasers, and the fact that a commission was payable indicated that they were merely agents for sale. The Judicial Committee (Lord Haldane, L.C. and Lords Dunedin, Atkinson and Moulton) agreed with the Court below, that the terms of the agreement were perfectly clear, that the Endertons themselves were entitled to exercise the option and the fact that they were also to get a commission was not inconsistent with their right to become the purchasers.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] IN RE WEST LORNE SCRUTINY. [Feb. 13.

Election law—Vote on municipal by-law—Scrutiny—Powers of judge—Inquiry into qualification of voter—Disposition of rejected ballots—Ontario Municipal Act, 1903, *ss.* 369 *et seq.* —*Voters' Lists Act*, 1907, *s.* 24.

A County Court judge holding a scrutiny of the ballot papers deposited in a vote on a municipal by-law may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. Davies and Brodeur JJ. dissenting.

The judge has no power to inquire whether rejected ballots were cast for or against the by-law.

Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law.

The Supreme Court affirmed the decision of the Court of Appeal, 26 O.L.R. 339, reversing the judgment of a Divisional Court, 25 O.L.R. 267, which reversed the decision at the hearing, 23 O.L.R. 598.

Appeal dismissed with costs.

Raney, K.C., for appellant. *C. St. Clair Leitch*, for respondent.

N.S.] NOVA SCOTIA CAR WORKS v. HALIFAX. [Feb. 18.

Municipal corporation—Exemption of industry from taxation—Special assessment—Local improvement.

By agreement with the City of Halifax, sanctioned by an Act of the legislature, a company doing business in the city was granted for a certain period "a total exemption from taxation" except for water rates.

Held, reversing the judgment of the Supreme Court of Nova Scotia, 45 N.S. Rep. 552, Fitzpatrick, C.J., dissenting, that a special assessment for a proportionate part of the cost of a public sewer, claimed to be chargeable against the lands of the company

was "taxation" within the meaning of said agreement and the company was exempt from liability therefor.

Appeal allowed with costs.

E. P. Allison, for appellant. *F. H. Bell*, K.C., for respondent.

N.S.] PICKLES v. CHINA MUTUAL INS. CO. [Feb. 18.

Marine insurance—Mutual company—Cancellation of policy—Return of unearned premium—Cancellation by operation of law.

A mutual insurance company incorporated under the laws of the State of Massachusetts issued marine policies in favour of parties in Nova Scotia who gave notes for the premiums. The policies provided for a return of premiums "for every thirty days of unexpired time if this policy be cancelled." Before any of the premium notes matured the policy holders were notified that the company had been put into liquidation at the instance of the Insurance Commissioner, the notice stating that the legal effect was "to cancel all outstanding policies." In an action by the receiver in the company's name to enforce payment on the notes:—

Held, 1, affirming the judgment appealed against, 46 N.S. Rep. 7, that the decision of the case must be governed by the law of Massachusetts; that the holder of a policy in a mutual company being both insurer and insured, the notes sued on were assets for distribution among the creditors; and the receiver was, therefore, entitled to recover the full amount.

2. A cancellation resulting from the action of the State was not a cancellation within the meaning of the above clause providing for return of premium.

Appeal dismissed with costs.

Mellish, K.C., for appellant. *Rogers*, K.C., for respondent.

Ont.] CANADA FOUNDRY CO. v. BUCYRUS. [Feb. 18.

Trade mark—Geographical name—Right to register—Interference with use.

A company in the United States engaged in the manufacture of certain articles for use on railways adopted the word "Bucyrus" as their trade mark for use in connection with such goods as distinguished from those manufactured by others,

and sold them for many years in the United States and Canada under that designation.

Held, that the company was entitled to register the word "Bucyrus" as their trade mark for use in connection with such goods.

For some years the Canada Foundry Co. was agent in Canada for selling the "Bucyrus" goods and built up a large business for their principals. After their agency terminated they applied the designation "Canadian Bucyrus" to similar goods of their own manufacture and eventually registered these words as a trade mark for such goods.

Held, that such trade mark should be expunged from the registry.

The judgment of the Exchequer Court, 14 Ex. C.R. 35, was affirmed.

Appeal dismissed with costs

J. K. Kerr, K.C., and *J. A. Paterson*, K.C., for appellants. *D. L. McCarthy*, K.C., for respondents.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] [Feb. 5.

HARRISON *v.* MADER.

MADER *v.* HARRISON.

Physicians—Agreement for employment followed by partnership — Construction — Partnership at will—Arbitration and award—Award outside terms of submission—Held void—Agreement not capable of enforcement.

An agreement in writing entered into between two medical practitioners provided for the employment of the one as assistant to the other for the period of two years for a specified sum in cash and a percentage of the net proceeds earned and received during the said years.

Held, affirming the judgment of the trial judge that before the commission became payable the money must be received as well as earned, though it need not be received in the same calendar year in which it was earned.

There was a provision that on the expiration of the period first provided for a partnership was to be entered into between the parties and that during the period of such partnership the assistant should receive for his services one-third of the net proceeds and the senior partner two-thirds and that a formal partnership agreement mutually satisfactory to both parties should be entered into, with a further agreement that in the events of the terms not being mutually satisfactory and the partnership not going into effect the respective rights of the parties in regard to patients and who should retain them to be referred to arbitration. No formal agreement was entered into, but the parties continued to do business together for a period of six months after the expiration of the original period, after which there was an arbitration and an award.

Held, 1. Affirming the judgment of the trial judge that during the period of six months after the expiration of the original period the relation between the parties was that of partners at will, rather than an employment on the original terms.

2. As the provision in the agreement with respect to retaining patients on the termination of the agreement contained no effective provision binding on either party, the court could not enforce it either by specific performance or injunction.

3. An award which goes outside the terms of the submission or is uncertain is void and cannot be enforced.

Roscoe, K.C., for appellant. *Rogers*, K.C., for respondent.

Province of Quebec.

COURT OF REVIEW.

Tellier, DeLorimier, and Greenshields, JJ.] [Dec. 24.

BESNER *v.* LEVESQUE.

(8 D.L.R. 494.)

Real estate agent—Taking offer and contract in his own name.

A real estate agent who without disclosing that he is a real estate agent obtains in his own name a contract of sale of a property at a fixed price and disposes of it to a third party

is not entitled to charge the vendor with any commission on the sale of such property inasmuch as there is no contract of agency whatsoever. *Stratton* v. *Vachon*, 44 Can. 395, referred to; and see *Haffner* v. *Grundy*, 4 D.L.R. 529, and Annotation, 4 D.L.R. 531.

E. Pélissier, K.C., for plaintiff, appellant. *T. E. Walsh*, K.C., for defendant, respondent.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ.] [Dec. 20.

REX *v.* WHISTNANT.

(8 D.L.R. 468.)

Evidence—Guilt — Presumptions and inferences—Statement or admission of accused—Interpretation by surrounding circumstances—Corroboration.

Held, 1. The statement or admission of the accused in the words, "I won't do it again," may constitute an implied admission of guilt of the particular crime of which he is charged, by inferences drawn from the circumstances under which the statement was made to identify what it was that his promise had reference to and to shew, in the absence of direct evidence, that the person to whom the exclamation was addressed must have charged accused with the crime immediately prior to the making of such statement.

2. As sec. 1003 of the Criminal Code (1906) specifically requires that the "testimony admitted by virtue of this section" *i.e.*, a statement taken in Court from a child of tender years not understanding the nature of an oath upon the trial of certain sexual crimes, must be corroborated by "some other material evidence in support thereof implicating the accused," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by the Code of the testimony similarly taken from another child of tender years. (Dictum *per* Harvey, C.J.). *R.* v. *Pailleur*, 15 Can. Cr. Cas. 339; *R.* v.

Daun, 11 Can. Cr. Cas. 244, 12 O.L.R. 227; *R.* v. *Iman Din*, 18 Can. Cr. Cas. 82, referred to.

L. F. Clarry, for the Crown. *W. S. Davidson*, for the defendant.

Book Reviews.

Mishuah: A Digest of the basic principles of the Early Jewish Jurisprudence. Translated and annotated by HYMAN E. GOLDIN, LL.B., of the New York Bar. G. P. Putnam's Sons, New York and London, 1913 (205 pages).

This work places before those interested in the study of the origin of law in general, a translation, in our Common Law Language, of the Jewish Mishuah, which enunciates the basic principles of Jewish Jurisprudence and which the Talmud elaborates and seeks to explain. It is especially interesting as conveying an insight into the cultural and social life of the Jews of 2000 years ago.

The law laid down in the Mishuah would seem to be the result of the rulings of the Rabbis from time to time in disputed cases, meeting and settling them as occasion arose, and in that respect similar to the origin of our Common Law. A perusal of this book shows the remarkable similarity existing between the rules of law laid down for the Jewish people of old and our Common Law as it exists to-day.

The book is a clever and intelligent presentation of a most interesting and important subject and might, we think, with much advantage to legal literature, be enlarged upon in a future edition.

Flotsam and Jetsam.

Judge Philips was holding court in Missouri and stopping at an hotel that was known all over the State as one of the worst if not *the* worst.

A man was brought before the judge charged with larceny and pleaded guilty. "Prisoner," said the judge, "this is an atrocious crime you have committed and I intend to punish you severely. I wish I had it in my power to send you to our hotel for six months, but I have not that power and therefore can only put you in jail."

UNFRUITFUL.—The learned counsel was endeavoring to impress the court with the fact that his clients had always been anxious to settle. "My Lord," he said, impressively, "only eighteen months ago we held out the olive branch." "Yes," responded the witty judge, "but there were no olives on it."—*Exch.*

A Wheeling, W. Va., lawyer says he has heard many queer verdicts in his time, but that the quaintest of these was that brought in not long ago by a jury of mountaineers in a sparsely settled part of that State.

This was the first case for the majority of the jury, and they sat for hours arguing and disputing over it in the bare little room at the rear of the court room. At last they straggled back to their places and the foreman, a lean, gaunt fellow, with a superlatively solemn expression, voiced the general opinion:—

"The jury don't think that he done it; for we allow he wasn't there; but we think he would have done it ef he'd had the chanst."—*Exchange.*

During the recent financial panic, according to a contemporary, a German farmer went to a bank for some money. He was told that the bank was not paying out money. but was using cashier's cheques. He could not understand this, and insisted on money.

The officers took him in hand, one after another, with little effect. At last the president tried his hand, and after long and minute explanation, some inkling of the situation seemed to be dawning on the farmer's mind. Much encouraged, the president said: "You understand now how it is, don't you, Mr. Schmidt?"

"I t'ink I do," admitted Mr. Schmidt. "It's like dis, aindt it? Ven my baby vakes up at night and vants some milk, I gif him a milk ticket."—*Exchange.*

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DOWER IN AN EQUITY OF REDEMPTION.

The cases of *Standard Realty Co.* v. *Nicholson* (1911), 24 O.L.R. 46, and *Re Auger* (1912), 26 O.L.R. 402, have re-agitated questions frequently before the courts since 1834, but which, whenever they arise, seem to cause difficulty in spite of repeated earlier judicial consideration. Therefore, some excuse exists for referring to earlier decisions and attempting to trace their effect upon the existing law of dower in a husband's equity of redemption.

Prior to 1834 the question could not arise, because a widow only had dower in the lands of her husband whereof he was *seized* during coverture: 25 Edw. 1, c. 7; see R.S.O. c. 330, s. 6 (1). Seizin implied the possession of a legal estate in lands, and so there was no dower in interests in lands of which courts of equity alone took cognizance. One of the reforms proposed by the Real Property Commissioners in 1829 and 1830 in England was an amendment to the law of dower whereby the widow should under some circumstances have dower out of her husband's equitable estates, and in 1833 an Act was passed, which was adopted in part in Upper Canada as 4 William IV., c. 1, giving a widow dower out of lands of which the "husband *dies* beneficially entitled whether wholly equitable or partly legal and partly equitable," and this enactment is preserved in the present Act respecting Dower, 9 Edw. VII., c. 39, s. 4. This enactment had an important effect upon that species of equitable estate known as the equity of redemption, because it enabled a widow to claim her dower where the equity of redemption subsisted in her husband at his death. He had died beneficially entitled, and so her dower must be assigned to her—subject, of course, to the mortgagee's prior claim. The only question then would be, what proportion of the equity of redemption must be set aside for dower? One-third of the value of the land after deducting the mortgage, or one-third of its value regardless of the incumbrances upon it? Where the husband

purchased the land subject to the mortgage—that is, where he acquired only the equity of redemption—there has been but little difficulty. The widow has been allowed dower out of one-third of the equity only, and not out of one-third of the value of the land regardless of the mortgage. So also the widow takes nothing if the husband assigned his equity of redemption before death. The statute of William gave no dower under such circumstances, and no earlier statute or rule of law was available to assist the widow. Upon this the cases of *Re Luckhardt*, 29 O.R. 111, and *Fitzgerald* v. *Fitzgerald*, 5 O.L.R. 279, may be consulted, and other cases cited hereafter bear this out; so we shall not stop to quote other authorities at present. We are therefore able to formulate two propositions with a fair degree of certainty: *I. Where the husband purchases an equity of redemption the wife only has dower where he dies beneficially entitled. II. Dower is only assigned to her out of one-third of the value of that equity of redemption. The mortgage must be deducted before making any calculation of the widow's interest in the lands.*

Quite other considerations arose, however, where the husband was seized of lands free from mortgage, but executed a mortgage in which the wife joined to bar her dower. Two questions then arose: (1) Did the wife's dower subsist in the equity of redemption whether the husband conveyed it or not during his lifetime? And (2) where dower did attach in the equity of redemption, how much of it must be assigned for that purpose? One-third of the surplus over the mortgage, or one-third of the value of the land payable out of that surplus? It was recognized, of course, that dower having been barred for the benefit of the mortgagee, such questions did not affect him. They were only relevant in considering the claims of the husband's creditors, devisees, assignees of the equity of redemption, or next-of-kin.

Let us take the first of these questions, namely, whether the wife's right to dower was vested in her so that her husband or the mortgagee could not so convey the equity of redemption as to deprive her of it after the mortgagor's death. To answer this inquiry we must consider the law between 1834 and 11th March, 1879, when the Act to Amend the Law of Dower, 42 Vict., c. 22,

was passed. The point came up in 1852 in a case where the mortgagee had sold under power of sale after the mortgagor's death, and it was said that either the husband or the mortgagee could sell free from dower, the husband never having had more than an equitable estate: *Smith* v. *Smith*, 3 Gr. 451. The case is not entirely in point, however, because the husband in his lifetime never had the legal estate. He was merely a purchaser of the lands, and mortgaged his equitable estate as purchaser, giving the mortgagees power to get in the legal estate from the vendor, which they did.

The point, however, never created much difficulty until the enactment of the statute of 1879, and it was laid down by the Court of Appeal in *Martindale* v. *Clarkson* (1880), 6 O.R. 1, that prior to 1879 the wife had no estate in her husband's equity of redemption after a conveyance made in his lifetime, even though he had been seized of the lands, provided he mortgaged them in his lifetime and the wife joined to bar her dower. See also *Beavis* v. *McGuire* (1882), 7 A.R. 704, at p. 713. The same principle had also been adopted in *Black* v. *Fountain* (1876), 23 Gr. 174, and *Fleury* v. *Pringle* (1878), 26 Gr. 67. We can therefore state the following further position with some assurance of being correct.

III. Before March 11th, 1879, where a wife joins with her husband to bar her dower in a mortgage, she may be deprived of her dower if the equity of redemption is conveyed either by the husband during his lifetime or by the mortgagee under his power of sale.

After March 11th, 1879, different considerations arise, based upon the effect of ss. 1 and 2 of 42 Vict., c. 22. Section 1 provided that no bar of dower in a mortgage should operate to bar dower to any greater extent than is necessary to give full effect to the rights of the mortgagee; and s. 2 preserves the wife's dower in any surplus arising where the lands are sold by the mortgagee under his power of sale or where they are sold by any legal process. The question first arises whether the wife by virtue of the statute retains her inchoate right of dower in an equity of redemption after joining in her husband's mortgage to bar her dower. In *Martindale* v. *Clarkson* (1880,) 6 A.R., at pp. 5 and 6, there are *dicta* of Patterson, J.A., to the effect that this Act creates a "new right" in the

wife's favour entitling "her to dower out of that equitable estate notwithstanding that the husband should not die seized of it," and at p. 6 he says, "but it extends the rule to cases not reached by that decision when it recognizes the right of the wife where the sale takes place in the lifetime of the husband." These *dicta*, however, did not summarily dispose of the point. It came up squarely for decision in 1885 in *Smart* v. *Sorenson*, 9 O.R. 640, a judgment of Mr. Justice Ferguson, which, if correctly reported (it was an oral decision at *nisi prius*, and is not verbatim), decided that, notwithstanding 42 Vict., c. 22, the wife took no estate in her husband's equity of redemption during his lifetime. The decision, however, seems to be at variance with certain *dicta* of that very learned judge in *Re Luckhardt* (1898), 29 O.R. 111, at p. 117, where he quotes *Martindale* v. *Clarkson* and speaks of the "new right" conferred by the statute of 1879. He there says, "since the passing of that Act she is entitled to dower out of an equitable estate regardless of the husband's dying seized (*sic*) of it, when the equitable estate comes into existence by the husband being owner of the land, executing a mortgage upon it, in which the wife joins to bar dower." *Smart* v. *Sorenson* was discussed by the Chancellor in *Re Croskery* (1888), 16 O.R. 207, where he says, in what is expressly stated to be a dictum: "Personally I do not see why the wife's claim to dower should in these cases rest in the caprice of her husband. She has foregone her dower for a certain purpose, and that being satisfied, it revives, and all the world has notice of this, so that if the husband assigns or sells the equity the assignee or grantee is not a purchaser for value without notice of her possible rights if the mortgage is more than satisfied out of the land." See also *Ayerst* v. *McClean* (1890), 14 P.R. 15, to the same effect. The point was expressly decided in favour of the wife in *Pratt* v. *Bunnell* (1891), 21 O.R. 1, though that case was disapproved upon another branch of it, namely, the *quantum* of dower assignable. See *Gemmill* v. *Nelligan* (1894), 26 O.R. 307. This brings us down to 1911, when Mr. Justice Riddell, in *Standard Realty Co.* v. *Nicholson*, 240 L.R. 46, following *Pratt* v. *Brunnell* upon the point which was not disapproved in *Gemmill* v. *Nelligan*, reaffirms the principle that after 1879 the

husband cannot convey the wife's inchoate right of dower in an equity of redemption created by his own mortgage in which she has joined to bar her dower. Apparently, apart from this decision he would have been prepared to hold the contrary: see p. 51. In *Re Auger* (1912), 26 O.L.R. 402, at p. 406, Sir William Meredith, sitting in Divisional Court, recognizes the "new right" conferred by Act of 1879, and so it may with some confidence be submitted as a further proposition that: *IV. Where, since March 11th, 1879, a wife joins with her husband in a mortgage and bars her dower in lands of which he was previously seized of a legal estate in fee, her inchoate right to dower subsists and is not lost by the husband's conveyance of the equity of redemption in his lifetime.*

The other questions which arise are even more difficult of solution upon the decisions and statutes, and they yet remain to be considered. They deal with the *quantum* of dower assignable out of the proceeds of the equity of redemption. A simple example will illustrate the problem: A husband owns lands which sell for $3,000. There is a mortgage of $2,000 to be paid, so that the equity of redemption is worth $1,000. Is dower assigned out of the whole value of the lands so that $1,000 must be set aside, or only out of the equity, $1,000, so that $333 must be assigned? This problem is also capable of subdivision: (1) Where the mortgage is to secure purchase money either before or after 1879; (2) Where it is to secure a debt of the husband's and is made before March 11th, 1879; (3) where it is to secure a debt of the husband's and is made after March 11th, 1879. It will be found that in both cases No. (1) forms an exception to the law affecting Nos. (2) and (3), so it will be dealt with only as a branch of the other two problems. Let us first inquire how much of the equity of redemption had to be set aside before March 11th, 1879, out of the proceeds of a sale available for the husband, his assignees, creditors, devisees, or next-of-kin, after satisfying the mortgage. Here we find a striking fluctuation of opinion, and the best way is to consider the cases historically, beginning with the year 1867. In that year *Sheppard* v. *Sheppard*, 14 Gr. 174, was decided, Vankoughnet, C., holding in an administration action that the widow took the whole surplus up to a point sufficient to give her

dower in one-third of the total value of the lands. In 1868, Vankoughnet, C., in *Thorpe* v. *Richards*, 15 Gr. 403, thought he had gone too far, and in a case where lands had been sold by the mortgagee under power of sale he held that the widow had dower in one-third of the surplus only, and this more restricted view was adopted by Mowat, V.-C., in *White* v. *Bastedo*, 15 Gr. 546, in 1869, where the sale had taken place in administration proceedings. It was also followed in favour of creditors by Mowat, V.-C., in 1872, in *Baker* v. *Dawborn*, 19 Gr. 113, though he takes the somewhat peculiar position that it would not be adopted in favour of the heir or next-of-kin, saying that this may be an anomaly, but is not the only anomaly in the law of dower. In the same year (1872) arose the case of *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334, where the mortgage with bar of dower had been given to secure unpaid purchase money. Here Spragge, C., without making any distinction between a mortgage to secure a loan to the husband and one to secure what is in effect a vendor's lien, held that the widow had dower in the surplus only. The case apparently was heard in appeal—see *Re Robertson*, 24 Gr., at p. 445; but there is no report of it. In 1876 were decided *Doan* v. *Davis*, 23 Gr. 207, and *Lindsay* v. *Lindsay*, *ib.* 210, where Spragge, C., and Proudfoot, V.-C., each held that the widow was entitled to dower based on the value of the land, not on the surplus only, and Proudfoot, V.-C., at p. 213, points out the true ground on which *Campbell* v. *Royal Canadian Bank* can be upheld, namely, that the mortgage was to secure unpaid purchase money. Spragge, C., in *Doan* v. *Davis*, makes no reference to the apparent change of view since his decision in the *Campbell* case. Then came *Re Robertson*, 24 Gr. 442, decided by Proudfoot, V.-C., in 1877, and *Robertson* v. *Robertson* (1878), 25 Gr. 276 and 486, decided by the full court upon a re-hearing of the same case. Those judgments decide that even as against creditors the widow is entitled to dower based on the value of the land, though payable out of the surplus only. The lands in that case were sold under an administration decree, the mortgagee was paid, and there was a surplus claimed by creditors. The money had been borrowed by the husband, and was not unpaid purchase money. The principle laid down in

appeal is that when the husband borrows money on his land for his own debt, the wife by barring her dower pledges her inchoate estate in it as surety for her husband's debt, and that, except so far as it is necessary to protect the mortgagee—the principal creditor—she, the surety, cannot be said to have parted with or destroyed her interest in the lands, so that, if the mortgagee realizes upon or is paid out of the lands, she as surety is entitled to the mortgagee's rights to the extent necessary to ensure that her whole interest (or so much of it as is left after satisfying the mortgage) is returned to her. Such reasoning, of course, will not apply to cases of unpaid purchase money, where, owing to the existence of a vendor's lien, she never took any estate at all except in the surplus. These decisions, in spite of their very considerable variance, probably justify the statement of our next proposition, as follows: *V. Prior to March 11th, 1879, where a widow has barred her dower by a mortgage but becomes entitled to dower out of an equity of redemption, the amount assignable is one-third of the total value of the lands except where the mortgage is to secure unpaid purchase money, when she has dower in one-third only of the surplus, and it makes no difference whether the surplus is realized from a sale under power of sale or legal process or whether it is voluntary.*

Having ascertained the law prior to March 11th, 1879, let us now consider what effect (if any) the statute 42 Vict., c. 22, had on the computation of the value of dower. Originally there were only two sections (numbers 1 and 2) bearing on the point. They will be found in an altered condition in 9 Edw. VII., c. 39, s. 10. The effect of the original enactment has been already stated *supra*. Mr. Justice Ferguson, in *Re Luckhardt*, 29 O.R. 111, at p. 117, points out, as already mentioned, that the statute gives a "new right" to dower in an equity of redemption which the husband cannot assign; and then he says: "So far as I am able to see, the right to equitable dower in cases other than the one above described is unaffected by that statute, and stands as it stood before the Act was passed." In other words, if this view is correct, the statute had very little if any effect upon the quantum of dower assignable out of the equity of redemption.

Notwithstanding this view, the Act gave rise again to a good deal of discussion, and there was a marked difference of opinion

amongst the judges. Let us again consider some of the more important cases historically. The first of these is *Re Hague* (1887), 14 O.R. 660, where it was held by Mr. Justice Ferguson, in an administration action, that the widow was entitled to dower according to the full value of the lands, assignable out of the balance of purchase money left after satisfying the mortgage, and speaking of s. 1, that learned judge says, at p. 666, "whatever may be the full meaning of the section it seems clear to me that it cannot be held to have the effect of making the rights of a doweress less than they were held to be in the case of *Re Robertson*." This view was accepted by the Chancellor in *Re Croskery* (1888), 16 O.R. 207, at p. 209, though it was not there necessary for the decision of the case. In *Pratt* v. *Bunnell* (1891), 21 O.R. 1, it was held on the contrary by a Divisional Court that the widow could only claim dower based upon the value of the equity of redemption. The mortgage there was to secure unpaid purchase money, and while there was then no exception in the statute in such a case, the principle of *Campbell* v. *Royal Canadian Bank* and *Re Robertson*, *supra*, might well have been applied in support of the decision, but no such distinction was made, and it was said that, having barred her dower in the mortgage, the widow barred it for all purposes to the extent of the mortgage money; and as against her husband's representatives she could claim only an assignment of one-third of the surplus for dower. In *Gemmill* v. *Nelligan* (1894), 26 O.R. 307, the point again came before a Divisional Court. There the mortgage was not for unpaid purchase money, but to secure a debt of the husband's (see *per* Robertson, J., p. 314), and the court declined to follow *Pratt* v. *Bunnell*, holding that dower was payable on the basis of the total value of the land. It was with these conflicting decisions before it that the Legislature passed the statute 58 Vict., c. 25, s. 3 (Ont.), which annulled the effect of *Pratt* v. *Bunnell*, and by statute placed the law upon the footing of *Gemmill* v. *Nelligan*, expressly making an exception in the case of a mortgage for unpaid purchase money. This enactment forms part of 9 Edw. VII., c. 39, s. 10 (2), and is the part of the section under review in *Re Augur* (1912), 26 O.L.R. 402, where the subject is again learnedly reviewed, and it is laid

down that neither under the amendment of 1895 in cases where there is a sale by legal process or under power of sale, nor in cases of voluntary sale apart from that amendment, can a widow claim dower out of more than one-third of the surplus where the mortgage is to secure unpaid purchase money. This brings us, therefore, to our last proposition, namely: *VI. Since March 11th, 1879 (as before), the widow is entitled to dower based on the total value of the land except where the mortgage is for unpaid purchase money, when her dower is based upon the value of the surplus after deducting the mortgage, whether that surplus is realized from power of sale, legal process, or by payment of the mortgage by voluntary sale or otherwise.*

SHIRLEY DENISON.

THE COURT OF KING'S BENCH IN UPPER CANADA, 1824-1827.

BY THE HONOURABLE MR. JUSTICE RIDDELL, L.H.D., LL.D.

(*Fourth Paper.*)

Many of the motions made before the court are such as have recently been made in the Divisional Court, e.g., motions for a new trial on the ground that the verdict is against evidence, or against the weight of evidence, or for wrongful rejection or admission of evidence, the verdict excessive, etc. There was a difference in the manner of making such motions, indeed; the complaining party would move for a Rule Nisi to set aside the verdict, etc.; if a primâ facie case was made, a Rule Nisi would be granted. This would be served upon the other side, and counsel appeared on the day fixed and argued the matter. If the appeal was allowed, the rule was made absolute; if dismissed, the rule was discharged.

But there were many matters which are no longer heard of in "Full Court." Submissions to arbitration were made Rules of Court in order to enable one who was not satisfied to move against the award; actions were stayed until the attorney for the plaintiff should produce his warrant and authority for bringing the action; sci. fa. obtained to revive judgments; rules granted

to the sheriff to return writs of fieri facias; to set aside cognovits; attachment for non-performance of award and appointment of a guardian to sue for an infant, etc., etc. None of these do we find in the court at all at the present time. But there are other matters which were in those days solemnly passed upon by the full court, which are now disposed of in Chambers, by a judge or the Master; e.g., leave to discontinue; change of venue; order for security for costs, the plaintiff being out of the jurisdiction; entering up satisfaction; leave to amend pleadings; leave to have further time to plead; to amend writs of execution; particulars of demand, etc., etc.

There are a few matters to which particular reference may be made. The plaintiff might give notice of trial and fail to go to trial at the assizes for which notice was given. In that case, the court might, and generally did, order him to pay the defendant's costs as a punishment for not going to trial; but the defendant could not give notice of trial, himself.

Demurrers were not uncommon, due chiefly to the strictness with which pleadings were construed. In those days the court did not call upon the plaintiff to set out the facts upon which he relied so much as the legal consequences of the facts. If the declaration (statement of claim) did not disclose a cause of action, the proper and usual course was for the defendant to demur, i.e., to say in effect that granting all that is alleged to be true, the plaintiff has no legal right to relief. Nowadays we should raise a point of law and have it decided under C. R. 259; but in those days counsel would demur and then apply for a "dies concilii," "dies consilii" or "concilium," i.e., for a day upon which the court would hear argument upon the demurrer; and upon the day so fixed, counsel on both sides would be heard and the question decided, the demurrer being "allowed" or "overruled," as the case might be. Demurrers were abolished by Rule 1322 in 1894.* (See 16 P.R., p. xv.)

*I believe I argued the last demurrer at Osgoode Hall: it was before Galt, C.J., just before the rule came in force. What has been so far spoken of was the general demurrer. In addition, there were special demurrers of all kinds. For example, I remember while a student drawing

Perhaps what would strike the modern practitioner most forcibly was the practice in ejectment. To anyone ignorant of the history of the English law, the old action of ejectment would seem a monument of wrongheadedness and technicality; but the history discloses that this form of action was in reality an ingenious device for doing justice without altering the old forms of law. The late Goldwin Smith was wont to remark that to expect lawyers to reform legal procedure was to expect the tiger to abolish the jungle. This gibe is repeated from time to time by those who should know better. Nothing is more false than what is suggested; all the improvements and reforms which have ever been made in legal procedure have been made by lawyers—the old technicalities were not the work of lawyers—primitive law had no lawyers.

And accordingly the action of ejectment, odd as it now seems by reason of improvements brought about by lawyers, was a distinct advance on the previous practice.

When A. is in possession of land to which B. claims to be entitled, the modern practice is for B. to issue a writ against A.; but it took many centuries for our simple and direct method to be adopted. The course pursued at the time we are speaking of was this:—

B. pretended to make a lease to John Doe, or Henry Goodtitle, or James Righteous—the name was immaterial, there was no such person—then it was pretended that John Doe, etc., went into possession of the land under the lease and that one Richard Roe, or William Badtitle, or Nicholas Badman—again the name was immaterial—and put the tenant off. Then John Doe, etc., sued for damages for trespass this Richard Roe, etc., the Casual Ejector. He might get judgment against casual ejectors by the

a declaration and in it laying the venue, "The County of Lennox and Addington." The solicitor for the defence had been brought up in Cobourg in the United Counties of Northumberland and Durham; and he supposed that Lennox and Addington were in the same condition. He accordingly filed a special demurrer, saying that the venue should have been "The United Counties of Lennox and Addington." I had an easy triumph by referring to the Statute R.S.O. 1877, c. 5, s. 1, ss. 20, p. 22. We have had no special demurrers since the Judicature Act, and get along very comfortably without them.

dozen without doing himself any good, so long as the real occupant A. was not notified or before the court. But the courts evolved a practice, said to be the device of Rolle, C.J., in the time of the Commonwealth, that if the actual tenant on being notified did not apply to the court to be admitted defendant in the room and stead of the Casual Ejector, he was to be held to have no right at all. The practice was to draw a declaration in "John Doe, on the demise of B. v. Richard Roe," setting out (1) title in B., (2) lease by him to John Doe, (3) entry by John Doe under the lease, and (4) ouster by Richard Roe; serve this on A. with a notice, as from Richard Roe, that he has no title at all to the land and shall make no defence, advising A. to appear in court and defend his own title otherwise he, the Casual Ejector, will suffer judgment to go against him, and A. will be turned out of possession. If A. does not appear in court, judgment will be given against the Casual Ejector and possession will be given to B. If A. desires to defend his title, then he will appear in court by his counsel, and apply to be admitted to defend in the place of the Casual Ejector. He will be permitted to do so only on condition that he will confess lease, entry and ouster, so that the only question to be tried will be the title of B. Thus a string of legal fictions was invented, so that the title of the claimant B. should alone come in question at the trial.

There were many cases of motion for judgment against the Casual Ejector and some of motion to be allowed in to defend in the place of the Casual Ejector. Defendants were held to their undertaking; in an Assize book of Mr. Justice Macaulay (still extant and at Osgoode Hall) in 1827, there are contained the judge's notes of a case in the Western District at Sandwich, in which Dr. Rolph, counsel for the defendant allowed in to defend, refused to make the admissions required. The judge held that, having taking out the "common rule" he was bound to make the admissions; he proceeded to try the case, although the admissions had been made. See Blackstone, Comm., Book 3, pp. 204, 205.

Questions of law were frequently reserved at the trial for the

decision of the court; for the argument of these a dies concilii had to be moved for.

In those days, in many actions the defendant could be compelled to give special bail or remain in custody until the trial of his action, etc., etc. What was done was for the plaintiff to issue a writ of capias ad respondendum and place it in the hands of the sheriff. The sheriff was bound to execute the writ by arresting the defendant. The theoretically regular practice was then for the sheriff to produce the defendant in the Court of King's Bench, with a return "cepi corpus," i.e., "I have seized the body of the defendant and have it ready." The defendant will have present two sureties and they enter into a recognizance that if the defendant be condemned in the action he will pay the amount and costs, or render himself a prisoner, or they will pay for him. If he did not pay, they could deliver him into custody and for that purpose were entitled to a warrant for his arrest.

Wednesday, November 9, 1825, Michaelmas Term, 6 George IV. (Præs. Campbell, C.J., and Sherwood, J.), "John Donaghue delivered to bail upon a Cepi Corpus to Matthew Donaghue, of the Home District, Yeoman and David Bates of the same place, yeoman, at the suit of Israel Ransome." This tells the story.

There were still echoes of the war of 1812. Wednesday, April 26th, 1826. Easter Term, 7 George IV. (Præs. Campbell, C.J., and Sherwood, J.), "*Rex* v. *John McDonell.* Motion for leave to take a certified copy of the indictment for high treason filed in the crown office against the above defendant John McDonell, James E. Small, Esq., for defendant, Granted." In the previous Term Book are several instances of motions made by the Solicitor-General, for copy of jury panel to give to prisoners about to be tried for high treason—those curious about the existence of treason at that time may look at the Provincial Statute, (1828), 9 George IV., c. 18.

The last matter I shall notice is proceedings taken in cases of alleged smuggling. The court was given the power of the Court of Exchequer in England in revenue cases, in cases of goods seized or contraband, in 1795 by 35 George III., c. 4—and it was

kept pretty busy in such cases. There will be found a long list of entries such as this which appears in Hilary Term, 6 George IV., December 28, 1825 (Præs. Campbell, C.J., and Sherwood, J.), "*The King* v. *Persons unknown.* Information on seizure at Chippewa, of sundry articles of merchandise on 1st December, 1825; 1st. Proclamation made. *The King* v. *Ditto.* Information on seizure by Collector of Dover on 27th September, 1825; 2nd. Proclamation made." Sometimes the kind of merchandise is mentioned, from which it would appear that what was generally smuggled was liquors of various kinds, tobacco and tea.

No one can say that the court in those days was not kept busy. The main difference in our present practice is simplification, decision of minor matters by a master or a single judge and disregard of petty technicalities—no slight gain.

WILLIAM RENWICK RIDDELL.

CONTRACTS IN RESTRAINT OF TRADE.

In the sale of the good will of a semi-professional establishment, it was recently decided that the vendor impliedly covenants not to re-enter or compete in any way with the vendee in the territory which his business previously covered. For the purposes of this discussion, it is sufficient to state that the Court based its decision on the distinction between the sale of the good will of a commercial enterprise and that of a professional concern, holding that in the latter instance the vendor tacitly consents not to re-establish himself in the vicinity of the old business, for to do otherwise would be in derogation of the vendee's rights.

Contracts in total or partial restraint of trade were originally held void as against public policy. This was based on the theory that no man could bind himself so as to deprive the Sovereign of his services. Subsequently, the Courts recognized the validity of such agreements when the restraint was only partial, the party being bound as to such stipulations of time and space reasonable in their nature and founded upon adequate consideration. To-

day the Courts freely extend relief by injunction where the restriction as to time or place is no more than is fairly and reasonably necessary for the proper protection of the covenantee. This principle applies with the same force when the transaction is for the sale of a professional business as distinguished from one in the nature of a trade.

Good will in general means that reputation which attaches to a man's business and may be the subject of a sale. True, the vendor cannot derogate from his own grant, yet there is nothing to prevent him from re-entering the field of competition unless the agreement stipulates otherwise. In all such instances, however, the vendor must act bona fide and must not wilfully injure or, by personal solicitation, defeat the rights of his vendee.

The question then arises, to what extent the vendor may re-establish himself in the community without interfering with the vendee to whom he has assigned the good will of his prior business. It is at this point that some Courts have drawn a distinction between the good will of a trade and that of a profession, alleging that in the former the good will attaches more to the nature of the business itself, while in the latter it adheres to and follows the person. But injunctions were granted either because the vendors had agreed to leave the field of their practice, the natural inference from which being they would not return, or because the vendors had been guilty of such wilful acts that the contract between the parties would have been rendered worthless without some interference by equity. In the principal case there was an agreement to sell the business, personal effects and good will of a chiropodist's establishment and nothing was said one way or the other about the vendor returning to the neighbourhood and re-entering the field. The vendor did come back, but in starting a new business conducted himself in such a manner as to destroy any good will which the vendee may have purchased. Yet the Court seemed to take the attitude that the mere act of returning was sufficient ground for their interference. It is submitted that the authorities upon which they base their decision do not warrant such a conclusion.

Whether or not a man engaged in the occupation of a chirop-

odist can be said to be pursuing a profession seems of little importance, since the Court assumed for the purposes of the decision that there were sufficient characteristics and features involved in the work to warrant the distinction from a trade.

The decisions in direct point are few, and though the relief granted here is in accordance with the result in similar cases, it is submitted that the reasoning of the Court is not borne out by the weight of opinion. The result, though a just and equitable one, opens up a wide latitude in which unwarranted conclusions may often be reached.—*University of Pennsylvania Law Review.*

APPAREL LOST AT RESTAURANTS OR ENTERTAINMENTS.

When seeking to ascertain the incidence of the damage to, or loss of, any apparel at a restaurant or other place of entertainment, it is very interesting, and quite as important, to note incidents which a layman may consider quite immaterial; in other words, to discover whether the customary liability of an innkeeper for the safe custody of a guest's goods, or a contract of bailment (gratuitous or for reward), or any other contract *inter vivos* is, in truth, at issue. It is scarcely necessary to remind the reader that one of the few positive duties known to English law is that, arising by the custom of the realm quite independently of any contract between the parties, whereby an innkeeper insures the safety of his guest's chattels left within his inn (even against injury or theft by a burglar, by his servant, or by another guest), in the absence of any act of God or of the King's enemies, or of any negligence of the owner: *Robins* v. *Gray*, 73 L.T. Rep. 252; (1895) 2 Q.B. 501). And for our present purpose it is material to remember that this duty, onerous and extraordinary as it is, attaches notwithstanding there has been no delivery of the chattels to the innkeeper or his servants, and no food or lodging having been supplied or found at the time of the loss (*Wright* v. *Anderton*, 100 L.T. Rep. 123; (1909) 1 K.B. 209), and notwithstanding the true owner of the chattels does not pay for the food or lodging supplied (*Gordon* v. *Silber*, 63 L.T. Rep. 283; 25 Q.B. Div. 491;

Wright v. *Anderton, ubi. sup.* And the innkeeper's pecuniary liability is only limited by the Innkeepers' Liability Act, 1863 (26 & 27 Vict. c. 41), which legislation, as it affects the present inquiry, amounts to this, that where the innkeeper can prove that a complete (*Spice* v. *Bacon*, 36 L.T. Rep. 896; 2 Ex. Div. 463) print in plain type of the exempting section of the Act was exhibited "in a conspicuous part of the hall or entrance of the inn," and neither the innkeeper nor the guest proves that the injury or loss was due to negligence for which the other is responsible, then, although the value of the article or articles of apparel lost be more than £30, the guest can recover no more than that sum: (*Medawar* v. *Grand Hotel Company*, 64 L.T. Rep. 851; (1891) 2 Q.B. 11).

It is, we think so extremely important in the case of a damage or loss to discern, in the very first place, whether the remedy arises from the owner being a guest at an inn, or from a liability as bailee either gratuitous or for reward, or for some other relationship existing between the owner and another person, and then, having done so, to keep the fact ever in mind, that we will select four suggestive and typical illustrations which may further elucidate the problem, and exhibit its many undecided difficulties.

1. Suppose that a wayfarer or traveller goes to an hotel to get a meal, and on entering the dining room hangs an overcoat on a peg; and that when he finished his repast, the coat is missing. Here there is sufficient evidence to establish the relation of innkeeper and guest, so as to make the hotel proprietor liable for the loss—subject, of course, to the limitation imposed by the Innkeepers' Liability Act—without proof of negligence on his or his servant's part, unless he can prove the loss arose from the negligence of the guest: *Orchard* v. *Bush and Co.*, 78 L.T. Rep. 557; (1898) 2 Q.B. 285. And if, instead of being missing, the coat were found to have been injured, the innkeeper would be liable for the injury, subject to the like limitation, as it seems clear that no just distinction as regards responsibility can be established between injury and loss: *Day* v. *Bather*, 2 H. & N. 14.

2. Again, take the case of a man, whether a traveller or not, entering a restaurant, not attached to or part of an hotel, who

finds a waiter in the vestibule or at the door of the dining room taking the customers' coats, sticks, etc. The mere fact that this waiter took the man's chattels, and disposed of them where he (the waiter) chose, would be evidence upon which a jury might properly find that the restaurant-keeper was a bailee of the chattels, and, accordingly, liable as a bailee should injury or loss occur; and this because such a practice does, or even might, add to the popularity and distinction of the establishment, and was probably adopted by the proprietor or manager with that very object in view: *per* Mr. Justice Charles in *Ultzen* v. *Nicols*, 70 L.T. Rep. 140; (1894) 1 Q.B. 92.

3. Thirdly, suppose that a man (traveller or not) enter a restaurant, or a "tea shop," and a waiter, without being asked, takes his hat and hangs it upon a hook behind him, and suppose that, while he is enjoying his meal, the hat disappears. Now, a person cannot be made liable as a bailee without his consent; and it has to be confessed that these assumptions present a vexatious and troublesome question whether they show a bailment of the hat, or merely a taking of the hat as an act of good nature, or an act of service, and without any intention of taking charge of it. Still, on the whole, they present evidence upon which a jury might find a bailment, and, if so, more assuredly, that the restaurant-keeper was guilty of negligence while the hat was in his custody, owing to want of reasonable care on his part: *Ultzen* v. *Nicols*, *ubi sup.*; and cf., as to the negligence, *Phipps* v. *New Claridge Hotel*, 22 Times L. Rep. 49; *Bullen* v. *Swan*, 23 Times L. Rep. 258; *Giblin* v. *M'Mullen*, L. Rep. 2 P.C. 317).

4. Lastly, at a subscription dance or concert held in a country institute or assembly room, a subscriber leaves his overcoat in the cloak room, and it is afterwards found missing. The evidence may negative a bailment with the entertainment committee, and as to any breach of an implied contract by the committee to take proper care of any chattels so deposited, it may be negative by the low price of the tickets: *Baker* v. *Cain*, *Times*, 23rd Nov., 1812, p. 3.

It is evident, therefore, that if the place visited be not an inn, the customer must show some express or implied contractual

obligation, or a bailment. And the reader may have concluded, and we think correctly, that the traveller in the first case would have had to suffer the loss if the place he had gone to had not been an inn, because he did not deliver his overcoat to the innkeeper or one of the servants, and, as every lawyer knows, and the derivation of the word "bailment" suggests, delivery of the chattel in trust is essential to a bailment of it. In the second case a small cloak-room charge might have been demanded and paid; and, therefore, it will be useful to recall that a bailment may be either for reward or gratuitous, and that this distinction affects, and very reasonably so, the degree of diligence which is expected of the bailee. And whenever the place is not an inn, it may be worth considering whether the responsibilities of a boarding-house keeper, or at least some of them, which were a few years ago discussed and enunciated in a case in the Court of Appeal *Scarborough* v. *Cosgrave*, 93 L.T. Rep. 530; (1905) 2 K.B. 805), do not also attach to the proprietor of the establishment in question; and further to bear in mind that if liability for injury or loss exist, it would not be limited to £30.

It appears, then, that in a case of customary liability, a plaintiff has to, if it be possible, prove he visited an inn (see *Thompson* v. *Lacy*, 3 B. & Ald. 286), and that the relationship of innkeeper and guest, in the legal sense of these terms, arose. In this connection we would point out that when Mr. Justice Wills stated (*Orchard* v. *Bush and Co.*, *ubi sup.*) that, from the point of authority, he did not think that there was much to be said for the proposition that the term "guest" is to be limited to a wayfarer, and that the liability of an innkeeper arises whenever he receives a person *causâ hospitandi* or *hospitii*, it was *obiter*, as the plaintiff in the case was held to be, and clearly was, a traveller; and, with great respect for that learned judge, we must add that this dictum appears to be inconsistent with other cases (*e.g.*, *Burgess* v. *Clements*, 4 M. & S. 306; *Reg.* v. *Rymer*, 35 L.T. Rep. 774; 2 Q.B. Div. 136; *Lamond* v. *Richards*, 76 L.T. Rep. 141; (1897) 1 Q.B. 541). We should be glad if the meaning of the term came again shortly for consideration and judgment; as we are inclined to think it is still arguable that a person who dines at an inn

in his town, and then returns home, or goes on to the play or a ball, is not a "guest," and must, accordingly, frame his case irrespective of the fact that the place he visited was an inn.

The conclusion we must reach is that there are several nice points in this very everyday subject which, it may fairly be said, are as yet uncovered by decision, and remain of a very difficult and somewhat controversial nature. Each adviser will doubtless have, now and again, to make inferences which do not admit of rigid proof by precedent, or of support by *obiter dictum*. And there is, perhaps, an advantage in this state of things. For elasticity enables those who have to administer a law to adapt it the more readily to the modern requirements of the age.—*Law Times.*

BONUS DIVIDEND, WHETHER CAPITAL OR INCOME.

Turning to *Re Evans; Jones* v. *Evans* (107 L.T. Rep. 604)—that being the second case to which we are now calling attention—the distribution of a portion of the accumulated profits of a company among its shareholders, in the shape of a bonus dividend, led to the question there discussed: Was such a dividend to be treated as forming part of the income or of the capital of the trust estate of a deceased shareholder? In other words, was the tenant for life to be the recipient or the remaindermen? Mr. W. H. Gover, in his able Treatise on the Law of Capital and Income (2nd ed., p. 12), states with much conciseness, but none the less with absolute lucidity, the result of the various decisions that have from time to time been pronounced on this subject. It is a question of the intention that is manifested in each case. Thus, as the learned author points out, if a company resolves to divide its accumulated profits as dividends, any dividend so allotted in respect of settled shares belongs to the life-tenant as income, whether described as "bonus dividend" (*Re Northgate; Ellis* v. *Barfield,* 64 L.T. Rep. 625; (1891) W.N. 84), or "special bonus": (*Re Alsbury; Sugden* v. *Alsbury,* 63 L.T. Rep. 576; 45 Ch. Div. 237). On the other hand, if a company resolves to appropriate accumulated profits to

increase its capital, and issues new shares rateably to its members to represent the same, any shares so issued in respect of settled shares become part of the capital fund under the settlement: (*Bouch* v. *Sproule*, 57 L.T. Rep. 345; 12 App. Cas. 385; *Baring* v. *Ashburton*, 16 W.R. 452). What Mr. Justice Neville had, therefore, to satisfy himself was as to the precise character of that which the company had resolved to do. Was it the intention of the company to capitalize that portion of its accumulated profits which it was distributing? If that was the actual nature of the scheme, then the decision of the House of Lords in *Bouch* v. *Sproule* (*ubi sup.*) clearly governed the present case. In the absence of some special provision in the constitution of a company, it cannot, of course, authoritatively convert a portion of its accumulated profits into new capital against the wish of any individual shareholder. But Mr. Justice Neville was of opinion that, in the present case, the company had successfully done so by offering such inducements to the shareholders as prompted them to avail themselves of the scheme. By shewing that it was seeking to induce the shareholders to apply the bonus dividend in taking up further shares, the principle of *Bouch* v. *Sproule* (*ubi sup.*) became applicable. True it is that the shareholders were given an option to take the bonus allotted to them either as a dividend or to return it to the company as a payment in respect of new shares. And there are authorities which shew what the effect of that may be: (see, *inter alia*, *Re Malam; Malam* v. *Hitchens*, 71 L.T. Rep. 655; (1894) 3 Ch. 578; and *Re Despard; Hancock* v. *Despard*, 17 Times L. Rep. 478). But the learned judge did not think that in the present case there was enough in that to rebut the presumption which, according to *Bouch* v. *Sproule* (*ubi sup.*), ought to be regarded. Moreover, as his Lordship remarked, he had to deal with a case of trustees who, as between themselves and their beneficiaries, had no right of election, whatever they might have as between them and the company. This latter consideration, indeed, seems quite to dispose of any argument founded on the option point.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

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ADMINISTRATION—OUTSTANDING GRANT—LETTERS OF ADMINISTRATION MISLAID—RETRACTATION OF RENUNCIATION—FIRST GRANT.

Re Heathcote (1913) P. 42. In this case letters of administration had been granted twenty years ago to the estate of a deceased married woman to her husband's trustee in bankruptcy, the husband having renounced his right. Subsequently the bankruptcy was annulled on payment by the bankrupt of 20s. in the pound, and the trustee in bankruptcy had obtained his release as trustee. Recently a sum of £700 became payable to the legal personal representative of the deceased, and the husband applied for leave to retract his renunciation, for revocation of the outstanding grant, and for a fresh grant to himself. The former grant had been lost and could not be produced. Deane, J., granted the order, and directed that in future all grants to whomsoever made should contain a personal undertaking by the grantee that he will deposit the document with the Principal Registry if and whenever he shall receive a formal notification requiring him to do so. It may be observed that a similar undertaking would seem equally necessary in Ontario, to avoid the obvious inconvenience of having two outstanding grants to different persons. It is also to be noticed that the fresh grant in this case was general in its terms and not merely de bonis non.

MARRIAGE—ENGLISH MARRIAGE—ANNULMENT OF ENGLISH MARRIAGE BY FOREIGN COURT.

Stathatos v. *Stathatos* (1913) P. 46. This case although a divorce case is deserving of careful attention, not so much for the point of law, which is actually decided, as for the state of facts which it discloses, and the perils which it shews are incurred by English people marrying Greeks. In this case the plaintiff though born in France was domiciled in England and in 1904 was married in a registry office to the defendant a Greek and lived with him in England 3 years as his wife. She then went to Greece with the defendant, but when they got there he refused to introduce her to his relatives, or treat her as his wife and finally told her to go back to her relatives

in England. He then applied to a Greek court to annul the marriage and it was annulled on the ground that by the law of Greece the English marriage was void, because it had not been solemnized in the presence of a Greek priest. The defendant subsequently married again and the plaintiff brought the present writ for a divorce on the ground of his adultery, which was granted. In the interests of religion and morality it would seem that some effort ought to be made to secure international comity on the subject of marriage. As the law at present stands it affords scoundrels an excuse for their immoralities.

PRINCIPAL AND AGENT—STOCKBROKER—SPECULATIVE TRANSACTION—DEATH OF PRINCIPAL—CLOSING ACCOUNT—DUTY OF BROKER—TAKING OVER STOCKS BY BROKER.

In re Finlay, Wilson v. *Finlay* (1913) 1 Ch. 247. In this case the plaintiffs were stockbrokers and were employed by one Finlay to purchase shares of a speculative character on his account. The plaintiffs entered into contracts to buy shares on his account and before settling day Finlay died. Finlay had previously given the plaintiffs authority to sell the shares and also any shares of his held by them as security. The plaintiffs closed the account and took over the shares contracted to be purchased for Finlay themselves, at what the Master found was their fair value at the time. This action having been brought for the administration of Finlay's estate, the claim of the plaintiffs was disputed because there had been no actual sale of the deceased's shares, and Warrington, J., held that the plaintiff's duty on the death of Finlay was to close the account and to minimize the loss to their client in respect of his indemnity to them, to the utmost extent, but that for this purpose it was not absolutely necessary for them to sell the shares, as their doing so might create a slump in the market, but that it was competent for them to take over the shares as they had done at their true value.

MORTGAGOR AND MORTGAGEE—FORECLOSURE—"ACTION FOUNDED ON BREACH OF CONTRACT"—ORIGINATING SUMMONS—SERVICE OUT OF JURISDICTION—RULE 64(*e*)—ONT. RULE 162(*a*).

Hughes v. *Ovenham* (1913) 1 Ch. 254. This is an appeal from the decision of Neville, J. (ante p. 185). The Court

of Appeal (Cozens-Hardy, M.R., and Farwell, and Hamilton, L.JJ.) as we previously intimated reversed his decision. The question in issue being whether an originating summons for the foreclosure of a mortgage of personalty can be properly ordered to be served on a defendant out of the jurisdiction. Neville, J., thought it was an action founded on breach of contract and therefore was within the Rule 64(*e*), but the Court of Appeal held that it was not, because on an originating summons the court has no jurisdiction to give any relief on the contract, but the only relief which could be given on such a proceeding was to foreclose the defendant's equity of redemption. Proceedings by way of originating summons do not in Ontario include foreclosure of mortgages, and therefore the point actually decided can hardly arise in Ontario; yet in view of this decision it may be doubted whether a writ for foreclosure of the equity of redemption in personalty, in which a claim for relief on a covenant is also joined, could be authorized to be served out of the jurisdiction, except on the terms of first striking out the claim for foreclosure. With regard to actions to foreclose mortgages of land, they would appear to come within Ont. Rule 162 (*a*).

MAINTENANCE OF SUIT—COMMON INTEREST—ACTION BY OFFICERS OF TRADE UNION FOR SLANDER—"INDEMNITY BY UNION AGAINST COSTS"—ULTRA VIRES.

Oram v. *Hutt* (1913) 1 Ch. 259. The plaintiff in this case was a member of a trade union, and the object of the action was to compel the refunding of funds of the union which had been paid for the indemnification of some of the officers of the union, against the costs of actions brought by them for slanders uttered in their official capacity. A judgment had been recovered by the officers in the actions for £1,000 and costs and £25 respectively, but no part of the damages or costs could be collected from the defendant; and the plaintiffs' costs in the actions amounting to £949 had been paid out of the funds of the union. The plaintiff claimed that such payment was ultra vires and should be refunded. Eady, J., who tried the action held that the union had not a common interest with its officers in bringing the action and that the payments in question was ultra vires and must be refunded.

NUISANCE—INJUNCTION—FRIED FISH SHOP.

Adams v. *Ursell* (1913), 1 Ch. 269. The plaintiff in this case claimed that a fried fish shop carried on by the defendant in a house adjoining the plaintiffs' house was a nuisance and he claimed an injunction to restrain the defendant from continuing it. The evidence established that the defendant supplied fresh fish and had the most approved appliances, but that the odour caused by the frying fish was an inconvenience, materially interfering with the ordinary comfort physically of human existence, and therefore granted the injunction.

LEGACY—DISCLAIMER—RIGHT TO RETRACT DISCLAIMER—REFUSAL OF TENANT FOR LIFE TO RECEIVE INCOME—PAYMENT TO SECOND LIFE TENANT—DEATH OF SECOND LIFE TENANT—RIGHT OF FIRST LIFE TENANT TO RETRACT REFUSAL AS TO FUTURE INCOME.

In re Young Fraser v. *Young* (1913) 1 Ch. 272. In this case the facts were that trustees accepted and held a legacy in trust for the plaintiff for life, and after her death for her son for life and after his death for the residuary legatees, but the plaintiff being annoyed at the terms of the will refused to receive the income and with her consent it was paid to her son. The son having died she desired to retract her refusal quoad the future income and the question was whether she could do so as against the residuary legatees who contended that her refusal was absolute and could not be retracted. Eady, J., who tried the action came to the conclusion that the plaintiff's refusal to receive the income could not be treated as the disclaimer of a legacy and that as neither the trustees nor the residuary legatees had changed their position on the faith of that refusal, it could be retracted as far as the future income was concerned.

SETTLED ESTATE—LEASEHOLD—SPECIFIC BEQUEST—RENT AND OUTGOINGS TO BE PAID OUT OF GENERAL ESTATE—SALE BY LIFE TENANT—APPLICATION OF PROCEEDS OF SALE OF TRUST LEASEHOLD.

In re Simpson Clarke v. *Simpson* (1913) 1 Ch. 277. A testator bequeathed a leasehold to his executors and trustees in trust to permit his wife to occupy the same during her widowhood, and provided that the ground rent, rates, taxes and out-

goings, etc., of the property should be paid out of his general estate and his widow relieved therefrom: the widow occupied the premises for fourteen years and then sold the premises under the Settled Land Act and the question then arose as to the proper application of the proceeds. During the widow's occupancy of the premises the outgoings had amounted to £160 a year, which had been paid by the trustees out of the general estate.

The widow claimed that out of the general estate, the trustees should continue to pay her a similar amount; but Eady, J., was of the opinion that she was not entitled to anything in respect of the provision for payment of rent, and outgoings which he regarded as an extra benefit conferred on her to enable her to reside in the house, and was not a provision tending to induce her to abstain from exercising her statutory power of sale within the meaning of s. 51 of the Settled Land Act 1882—and he held that under s. 34 of the Act the proceeds of the sale must be applied in paying to the widow during her widowhood such an annuity as would exhaust the proceeds, capital and income, during the remaining eleven years of the lease.

SOLICITOR AND CLIENT—AGREEMENT AS TO COSTS—BILL OF EXCHANGE GIVEN FOR COSTS—BILL TAKEN AS PAYMENT—DELIVERY OF BILL OF COSTS—"FAIR AND REASONABLE"—ATTORNEYS AND SOLICITORS ACT 1870 (33-34 VICT. C. 28), S. 4—SOLICITORS REMUNERATION ACT 1881 (44-45 VICT. C. 44), S. 8 (1, 4)—(2 GEO. V. C. 28, SS. 49, 50, 56, 57, 58, ONT.).

Ray v. *Newton* (1913) 1 K.B. 249, was an action to enforce a bill of exchange given in payment of a sum agreed on between solicitor and client for costs. No bill had ever been delivered, and the defendant obtained leave to defend, but, without delivering a defence, made an application for the delivery of a bill of costs under the Solicitors Acts, and for an inquiry into the agreement as to whether it was fair and reasonable—The bill of exchange, which was not payable until two years from date, had been accepted by the solicitors as payment and had been dishonoured. The application was made in the action and without being entitled in the Solicitors Acts which the Court of Appeal held to be irregular, and directed to be amended. On the merits, the Court of Appeal (Farwell, and Hamilton, L.JJ.) disagreed with Rowlatt, J., that the making of the agreement and the

acceptance of the bill in payment, barred the client of his right to the delivery of a detailed bill of costs: and the court while allowing the appeal directed a delivery of the bill of costs as claimed.

APPEAL—"FINAL ORDER IN ACTION"—RULE 879—(ONT. JUD. ACT, S. 73).

Johnson v. *Refuge Assurance Co.* (1913) 1 K.B. 259, may be briefly noticed for the fact that the Court of Appeal (Buckley, and Kennedy, L.JJ.) held that an order of a Divisional Court dismissing an appeal from a final judgment in a County Court action, is, for the purpose of appeal "a final order" in an action within the meaning of Rule 879, (see Ont. Jud. Act, s. 73).

CRIMINAL LAW—INDICTMENT—JOINDER OF SEVERAL CHARGES AGAINST DIFFERENT DEFENDANTS—LARCENY ACT, 1861 (24-25 VICT. C. 96, S. 5)—(CR. CODE SS. 856, 857).

The King v. *Edwards* (1913) 1 K.B. 287. This was an application to quash an indictment after verdict. The English Larceny Act, 1861, s. 5, provides that several courts may be included in an indictment for any number of distinct acts of stealing, not exceeding three, committed against the same person within the space of six months from the first to the last of such acts (see Cr. Code ss. 856, 857). In the present case the indictment included one count for larceny against one defendant and also another count for larceny against the same defendant and another person jointly. This the Court of Criminal Appeal, (Ridley, Phillimore and Bankes, JJ.) held was not warranted by the Act, and the indictment was quashed, notwithstanding it was urged upon the part of the Crown that the defendant's case was devoid of merits, the court being of the opinion that some degree of prejudice had resulted to the defendants from the joinder of the counts.

PRINCIPAL AND AGENT—AGENT BORROWING WITHOUT AUTHORITY—UNAUTHORIZED LOAN TO AGENT APPLIED IN PAYMENT OF PRINCIPAL'S DEBTS—LIABILITY OF PRINCIPAL—NOTICE TO LENDER OF WANT OF AUTHORITY OF AGENT—EQUITABLE RIGHT OF LENDER.

Reversion Fund and Insurance Co. v. *Maison* (1913) 1 K.B. 364. This was an action by the plaintiff to recover from the de-

fendants (a limited company) the amount of a loan made by the plaintiff to the managing director of the defendant company, the plaintiffs knowing at the time that the director had no authority to contract the loan for the company. It appeared that the proceeds of the loan had been applied in payment of the debts of the defendant company. Scrutton, J., who tried the action, thought that in these circumstances the plaintiff had no right of action, and accordingly dismissed the action. The majority of the Court of Appeal (Buckley, and Kennedy, L.JJ.) took a different view, and considered that in substance the transaction did not amount to a borrowing, but merely the replacement of one debt by another of the same amount and although the plaintiffs had notice that the director was not authorized to borrow on behalf of the defendant company yet that was immaterial; and that in the circumstances, the plaintiff had an equitable right to recover.

It is pointed out in the judgments of the majority of the court that this equitable right of the plaintiff is not strictly a right of subrogation, because if it were, the plaintiffs would be entitled to the securities held by the creditors whose claims were discharged, but that they are not entitled to. It would rather appear to be an equity similar in some respects to, but at the same time distinct from the right of subrogation. Williams, L.J., though admitting the existence of the equity, held nevertheless it can only arise in the case of a lender who is ignorant of the agent's want of authority.

NEGLIGENCE—LANDOWNER — UNFENCED LAND—LEAVE AND LICENCE TO ENTER—CHILDREN—INVITATION—ALLUREMENT—DANGEROUS OBJECT—INJURY—LIABILITY.

Latham v. *Johnson* (1913) 1 K.B. 398, was an action to recover damages for an injury sustained in the following circumstances. The defendants owned a plot of unfenced land from which houses had been cleared. It did not adjoin any highway, but was accessible from the back of a house where the plaintiff, a child about 3 years old, lived with her parents. The public were allowed to traverse the land and children of all ages were accustomed to play upon heaps of stone, sand and other materials which from time to time were deposited there by the defendants. The plaintiff went on the land unaccompanied and was found upon a heap of paving stones one of which had fallen upon her hand and injured it. There was

no evidence to shew how the accident happened. The jury found that children played on the land to the knowledge of the defendants, that there was no invitation to the plaintiff to use the land unaccompanied; that the defendants ought to have known that there was a likelihood of children being injured by the stones and that the defendants did not take reasonable care to prevent children being injured thereby and upon these findings Scrutton, J., gave judgment for the plaintiff—he holding that the case was governed by *Cooke* v. *Midland and G.W. Ry.* (1909) A.C. 229, the turntable case (see ante vol. 45 p. 515), but the Court of Appeal (Cozens-Hardy, M.R., and Farwell, and Hamilton, L.JJ.), overruled his decision holding there being neither allurement or trap, nor invitation, nor dangerous object placed on the land, there was really no evidence to go to the jury on which they could find any legal liability on the part of the defendants for the injury complained of. The action was therefore dismissed.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ROYAL BANK OF CANADA *v.* THE KING.
(9 D.L.R. 337.)

Lord Chancellor, Lords Macnaghten, Atkinson, and Moulton.] [Jan. 31.

Contracts—Money had and received—Failure of consideration—Recovering back money—Loan under abortive scheme—Lender's rights—Constitutional law—Functions and powers of province—Act altering conditions of loan—Non-resident bondholders—Situs of remedy on failure of consideration—Act affecting extra-territorial rights.

Held, 1. When money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use; and this principle extends to cases where the money has been paid for a consideration that has failed.

2. Where money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect and the scheme becomes abortive, the lender has a right to claim the return of the money in the hands of the borrowers as being held to his use.

Wilson v. *Church*, 13 Ch.D. 1, in appeal *sub nom. National Bolivian Navigation Co.* v. *Wilson*, 5 A.C. 176, referred to.

3. Where the purchase price of bonds was remitted by the lenders in London to a branch of a Canadian bank in New York, to be applied in carrying out the proposed construction of a railway upon a guarantee of the bonds by the Provincial Government of Alberta, and in pursuance thereof the bank through its head office in Montreal authorised the opening of a credit for the amount in a branch of the same bank in Alberta subject to be drawn upon only upon the terms of the scheme which the province had approved by statute and order-

in-council, the province cannot, by declaring a forfeiture of the concession and enacting a statute purporting to alter the conditions of the scheme previously approved, acquire jurisdiction to legislate over the civil right which arose in favour of the bondholders in London to claim from the bank in Montreal, outside of the jurisdiction of the Alberta legislature, a return of the money which they had advanced for a purpose which had ceased to exist.

The King v. *Lovitt,* [1912] A.C. 212, distinguished.

4. As the effect of the Alberta statute, 1910, ch. 9, the Alberta and Great Waterways Railway Bonds Act, if validly enacted, would have been to preclude the bank, through which the money of the bondholders was being advanced under the terms of a government concession, from fulfilling its legal obligation accruing and remaining enforceable at a place outside of the Province of Alberta, the statute is *ultra vires.*

Sir R. Finlay, K.C., and *William Finlay,* for all the appellants. *J. H. Moss,* K.C., for the appellants the Alberta and Great Waterways Ry. Co., and the Canada West Construction Co. *S. O. Buckmaster,* K.C., *C. A. Masten,* K.C., and *Geoffrey Lawrence,* for respondents.

Dominion of Canada.

SUPREME COURT.

Que.] CITY OF MONTREAL *v.* LAYTON. [Feb. 18.

Public health—Suspected food for sale—Action by health officers Crntrol by Court—Evidence—Injunction.

In December, 1910, the appellant company had a large quantity of eggs, frozen in bulk, stored in the warehouse of a cold storage company, the mis-en-cause in the action. On Dec. 19th a food inspector of the city of Montreal entered the warehouse and removed four cans of the eggs, and on the 25th notified the cold storage company that the whole lot was under seizure until a report was obtained on the samples so taken. On Jan. 24th, 1911, the Chief Food Inspector of the city notified the cold storage company that they must consider the eggs as still under seizure and not allow any of them to be removed or sold, and on

the next day he instructed them to comply with an order of the Provincial Board of Health that the eggs were not to be sold anywhere in the province. On the 26th the respondents were notified that if the eggs were not removed from the province they would immediately be destroyed. The respondent company then brought action to restrain the city from further interference with their property, and a temporary injunction was issued which was enlarged from time to time until the action was decided when it was made permanent, the trial judge holding that the eggs were fit for human consumption and the city's proceedings were illegal. His judgment was affirmed by the Court of King's Bench on the ground that there had been no lawful seizure of the eggs and the injunction restrained the city from seizing or interfering with them otherwise than by due process of law. On appeal to the Supreme Court of Canada:—

Held, that the finding of the trial judge that the eggs were fit for human consumption should not be disturbed.

Held, per FITZPATRICK, C.J., DAVIES and IDINGTON, JJ., that the actions of the health officers in exercising the authority conferred on them by law are not final, but are subject to control by the Superior Court.

Held, per FITZPATRICK, C.J., that there was no lawful seizure of the respondents' eggs.

Held, per ANGLIN and BRODEUR, JJ., that the Chief Food Inspector did not exercise his independent judgment in condemning the eggs, but merely followed out the instructions of civic officials and could not claim any protection under the Public Health Act.

Appeal dismissed with costs.

Atwater, K.C., and *Aimé Geoffrion*, K.C., for appellants. *Dale Harris*, for respondents.

Ont.] BOULTER *v.* STOCKS. [Feb. 18.

Contract—Rescission—Sale of land——Misrepresentations—Affirmance.

B. advertised for sale his farm in Ontario stating the contents and describing it as in first class condition. He also stated the number of trees, old and new, in the orchard on it. S., then in Britsh Columbia, was shewn the advertisement and, after some correspondence in which B. reiterated the statements therein,

came to Ontario and spent some time in inspecting the farm which he finally purchased on B.'s terms and entered into possession. Shortly after he leased the orchard for ten years and within a day or two discovered that the farm contained over forty acres less than, and the contents of the orchard only half of, what had been represented; also that the farm was not in the condition stated, but badly overrun with noxious weeds. He, therefore, procured the cancellation of the lease of the orchard and brought action to have the sale rescinded.

Held, that the lease of the orchard was not, under the circumstances, an affirmance of the contract for sale which would disentitle S. to rescission; that if it were an affirmance as to the orchard the subsequent discovery of the other misrepresentations would entitle him to a decree. *Campbell* v. *Fleming,* 1 A. & E. 40, distinguished.

Appeal dismissed with costs.

Anglin, K.C., for appellant. *McKay,* K.C., for respondent.

Alb.] CROSS *v.* CARSTAIRS. [Feb. 21.

RE EDMONTON (PROVINCIAL) ELECTION.

Appeal—Provincial election—Preliminary objections—Judicial proceedings—Final judgment.

Held, per DAVIES, IDINGTON and ANGLIN, JJ., that under the provisions of the Alberta Controverted Elections Act, the judgment of the Supreme Court of the province in proceedings to set aside an election to the legislature in final and no appeal lies therefrom to the Supreme Court of Canada.

Held, per DUFF, J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the meaning of sec. 2(e) of the Supreme Court Act.

Held, per BRODEUR, J., that the judgment of the Supreme Court of Alberta on appeal from the decision of a judge on preliminary objections filed under the said Controverted Elections Act is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

Appeal quashed with costs.

Lafleur, K.C., and *O. M. Biggar,* for appellant. *Ewart,* K.C., for respondent.

N.S.] GRAVES *v.* THE KING. [Feb. 24.

Criminal law—Indictment for murder—Trial—Charge to jury—Non-direction—New trial.

On the trial of an indictment for murder of one Kenneth Lea it was proved that the prisoners, who had been drinking, came on the deceased's lawn and commenced to shout and sing and use profane and insulting language towards him. He twice warned them away and finally appeared with a loaded gun threatening to shoot. A rush was made towards the verandah where he stood when he took hold of the barrel of the gun and struck one of the prisoners with the stock. The gun was discharged into his body and there was evidence that the prisoners then maltreated him and his wife. He was taken to a hospital in Halifax, where he died shortly after. The trial judge in charging the jury instructed them that the prisoners were doing an unlawful act in trespassing on the property of deceased and that if they were actuated by malice it would be murder, if not, it was manslaughter, drawing their attention especially to sections 256 and 259(b) of the Criminal Code. The prisoners were found guilty of murder. On appeal from the decision of the Supreme Court of Nova Scotia on a reserved case:—

Held, that the judge should have drawn the attention of the jury to sub-section (d) of section 259 and directed them to find whether or not the prisoners knew, or ought to have known, that their acts were likely to cause death and his failure to do so was non-direction for which the prisoners were entitled to a new trial.

Appeal allowed with costs.

Roscoe, K.C., for appellants. *Newcombe,* K.C., for respondent.

Duff, J.] RE DEAN. [Feb. 25.

(9 D.L.R. 364.)

Theft—With breaking and entering—Cr. Code 1906, *s.* 11, 460—*Courts—Supreme Court (Can.)—Habeas corpus jurisdiction.*

Held, 1. The offence of breaking into a counting-house and stealing money therefrom as declared by the English statute 7-8 Geo. IV. c. 29, s. 15, was a part of the criminal law of British Columbia prior to its admission into Confederation, and

remains in force under Cr. Code, s. 11, subject to the change made by the Criminal Code as to the nature of the punishment.

[See Cr. Code, s. 460.]

2. A judge of the Supreme Court of Canada has concurrent jurisdiction with provincial courts to grant a writ of *habeas corpus* under the Supreme Court Act, R.S.C. (1906), c. 139, s. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament.

Re Sproule, 12 Can. S.C.R. 140, applied.

J. Travers Lewis, K.C., for applicant. *E. F. B. Johnston,* K.C., for Attorney-General for British Columbia.

Province of Ontario.

SUPREME COURT.

Garrow, Maclaren, Meredith, Magee, and Hodgins, JJ.] [Jan. 15.

COOPER *v.* LONDON STREET R. Co.

(9 D.L.R. 368.)

Street railways—Duty of railway company—Usual stopping place—Negligently running past stationary car—Trial—Submission of questions to a jury—Lack of care in running car—Car stationary discharging passengers—Taking case from jury—Negligence—Personal injuries.

1. A passenger who had just alighted from a street car which was being met on a parallel track by another, at a point where cars usually stopped to discharge and receive passengers, and where, to the knowledge of the railway company, it was the custom or habit of persons alighting from cars to cross a parallel track in order to reach another street, is not necessarily guilty of contributory negligence, where the fact that another passenger warned the plaintiff, a woman, to look out for the car, might well have flurried and perturbed her, as witnesses said, and led her to lower her head in the face of a strong wind, as

she went around the rear of the car from which she had just alighted, and attempted to cross the parallel track, where she was struck by a car which was negligently run past the stationary car at an unusually high rate of speed.

2. The negligence of the defendant street railway company was sufficiently shewn so as to prevent the withdrawal of such question from the jury, where the evidence disclosed that sufficient caution was not observed in running a street car towards a car standing on a parallel track discharging passengers at a street crossing where they were regularly discharged and received, and where, to the knowledge of the company, it was the habit or custom of passengers to cross a parallel track in order to reach another street, and that the car struck and injured the plaintiff, who had just alighted from the stationary car, and without noticing the car approaching from the opposite direction, passed around the rear of the standing car and stepped upon the parallel track.

Cooper v. *London Street R. Co.*, 5 D.L.R. 198, affirmed.

3. Where there is no reasonable evidence upon the whole case whether adduced by the plaintiff or the defendant upon which the jury could find in the plaintiff's favour in an action of negligence, the case should be withdrawn from them and the action dismissed; it is not necessary to go through the form of directing the jury to find a verdict for the defendant and of having such verdict recorded. (Dictum *per* Meredith, J.A.)

Hellmuth, K.C., for defendants, appellants. *Sir George C. Gibbons*, and *G. S. Gibbons, contra.*

Province of Manitoba.

KING'S BENCH.

Metcalfe, J.] [March 10.

CANADA LAW BOOK CO. *v.* BUTTERWORTH & CO. AND BUTTERWORTH & CO. (CANADA). (9 D.L.R. 324.)

Injunction—Contract rights—Competing business—Evidence—Contracts—Suggestive facts—Part performance—Statute of Frauds—Construction—Intention of parties—Several papers—Estoppel—Equitable estoppel by conduct—Continuation—Exercising option.

Held, 1. An injunction may be granted against a publisher and a company controlled by him, jointly sued for infringing his contract which conferred exclusive rights of sale of a copyrighted book upon another company in consideration of the latter's purchase of a specified number of copies of the work, to restrain the future selling or offering for sale of such work by either of defendants in contravention of the contract, and damages may be awarded for the past infringement.

See *Pitt, Pitts* v. *George & Co.*, [1896] 2 Ch. 866; *Walsh* v. *Whitcomb*, 2 Esp. 565; *Bohn* v. *Bogue*, 10 Jur. 421; *Re Hirth*, [1899] 1 Q.B. 612, 625.

2. In an action for infringement of exclusive territorial rights of sale conferred by contract, the court may give weight to the circumstance that the defendant had, prior to the expiry date for which he himself contended, and which was in dispute, made extensive preparations to invade the business territory in question in competition with the party holding such contractual rights, and had not communicated the fact to the latter.

See *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182; *Waterpark* v. *Fennell*, 7 H.L.C. 650, 678; *The "Curfew,"* [1891] P. 131.

3. Where an exclusive agency for a copyright publication has been granted within a defined territory in consideration of a guaranteed purchase by the agent of a large quantity for resale and where the parties for a long period thereafter have acted as though there were an enforceable contract and goods have been supplied and accepted in pursuance thereof, a plea of the Statute of Frauds (sec. 4) is not a bar in equity to the enforcement of the contract so acted upon, even if there were no sufficient memorandum to answer the statute.

Prested v. *Garner*, [1910] 2 K.B. 776, and in appeal, [1911] 1 K.B. 425, distinguished.

4. A letter setting forth in detail what the writer claimed had been agreed upon and purporting to confirm an unsigned cablegram sent by him a short time previously must be regarded in ascertaining the terms of a contract informally made and not theretofore completely shewn by a writing signed by the party to be charged; and where the party receiving the letter did not repudiate (although through inadvertence) and the contract in other respects was acted upon and partially performed, he must be taken to have accepted any variation of terms expressed in the letter.

5. Where documents can be connected by a reasonable inference, although there is no express reference from one document to the other, they may be read together so as to constitute a complete memorandum under the Statute of Frauds (sec. 4).

Bristol, etc., Aerated Bread Co. v. *Maggs*, 44 Ch.D. 620, applied; and see *Treadgold* v. *Rost*, 7 D.L.R. 741, 749.

6. A company may be estopped from setting up that the alleged stipulation relied upon by the other contracting party and set forth in a letter purporting to confirm the contract was in fact a variation from the terms already agreed upon, if the company without notifying the other party of its repudiation of the variance proceeds with the fulfilment of the contract in other respects; and this although such letter when received by the company was not brought to the attention of any of its officers or employees having authority to deal with the matter, of which circumstance the sender had no knowledge.

7. Where the contract provides that an extension of the original term for which exclusive selling rights of a copyright book are granted "shall be obtained" for another period by taking a specified quantity from year to year thereafter, the court may give effect to the renewal rights, although no notice was given during the original term of an intention to exercise the renewal option, where the election to renew was made within the first renewal year, and the other party has not been prejudiced by the delay.

See *Dainty* v. *Vidal*, 13 A.R. 47; *Barlow* v. *Williams*, 16 Man. L.R. 164; *Farley* v. *Sanson*, 5 O.L.R. 105.

A. B. Hudson, and *H. E. Swift*, for plaintiffs. *C. P. Fullerton*, K.C., and *C. S. Tupper*, for defendants.

(The judgment is given in extenso, ante, p. 361.)

Bench and Bar.

Judicial Appointments.

His Honour John Lynden Crawford, judge of the District Court of the district of McLeod, province of Alberta: to be the junior judge of the District Court of the district of Edmonton, in said province. (March 19.)

Edward Peel McNeill, of McLeod, province of Alberta, barrister-at-law: to be judge of the District Court of the district of

McLeod, in said province, in the room and stead of His Honour Judge Crawford, who has been transferred to the district of Edmonton. (March 19.)

His Honour William Roland Winter, judge of the District Court of the district of Lethbridge, province of Alberta: to be junior judge of the District Court of Calgary, in said province. (March 19.)

John Ainslie Jackson, of Ponoka, province of Alberta, barrister-at-law: to be the judge of the District Court of the district of Lethbridge, in said province, in the room and stead of His Honour Judge Winter, who has been transferred to the district of Calgary. (March 19.)

Book Reviews.

The outlines of procedure in an action in the King's Bench division, for the use of students. By A. M. WILSHERE, M.A., LL.B., Barrister-at-law. Second edition. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1913.

A most useful help to students in England and valuable for reference here; whilst many differences in procedure in the provinces of the Dominion prevent its being a safe guide here, there is much in it which all students should know about.

Flotsam and Jetsam.

MONEY THAT NO ONE CLAIMS.—Twenty millions of unclaimed money in the coffers of British banks,—derelict gold which nobody owns, and which the banks are naturally pleased to take care of! Gold more than sufficient to pave every square foot of Cheapside with sovereigns.

The sum total may be exaggerated. But make a liberal deduction, and you still have many millions to which no rightful owners make a claim. There is no bank in the whole length of Great Britain (or elsewhere) which has not its lists of these trivial sums, scarcely worth the trouble of pocketing; some are bank balances that may be said to go a-begging. Some are for amounts running into thousands.

Some years ago, when Mr. Goschen's conversion scheme was

in the air, it was found that the Bank of England alone had nearly 11,000 of these dormant accounts. Forty of them had more than $50,000 apiece to their credit; one balance was written in six figures,—907,990. The total at the bottom of the long list was $39,248,875. This amount was very largely made up of unclaimed dividends on government stock.

Scottish banks have, it is said, $45,000,000 of this overlooked gold. English banks at least double this sum. How does it come there? And what becomes of it?

It seems inconceivable that so much money, for all of which there must have been owners at some time or other, should be thus lost to sight. A score or more of simple causes account for the seeming impossibility. A man may for private or business reasons, have accounts with more banks than one. He dies, his executors know nothing of any but his usual banks; the balance at the others remain unclaimed.

He may die abroad, or disappear, leaving no clew to his banking affairs; he may even forget that such an account is not closed. In these and many similar ways—mostly the result of carelessness—money is left in the hands of bankers to swell the dormant funds.

For seven years the bankers keep the accounts open, prepared to pay over the balance to any who can prove a title to it. This term expired, they regard the forgotten gold as their own. Five million dollars of such ownerless money went to build London's splendid law courts. The city, it is said, has more than one magnificent bank building reared from the same handy material. The Bank of England, one learns, provides pensions for clerks' widows out of such a fund.

But, whatever becomes of it, these millions of "mystery gold" are always growing, fed by man's carelessness or forgetfulness, their secrets hidden away in thousands of musty bank ledgers.—*London Tit-Bits.*

CARRIERS.—A street railway company is held in *Lewis* v. *Bowling Green R. Co.* (Ky.) 39 L.R.A. (N.S.) 929, to be liable for the death of a boy whom the motorman in charge of the car has received for transportation to the police station, where he refuses to permit him to leave the car, and in attempting to restrain him from doing so the boy falls under the wheels and is killed, since the boy, being a passenger, is entitled to treatment as such, and to have the car stopped at his request to give him an opportunity safely to alight.

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TRADE UNIONS UNDER ENGLISH AND AMERICAN LAW.

Fiction and law are curiously blended in a legal or historical consideration of the origin, purposes, regulations, or control of trade unions, and in the effect of legislative enactments to guide or curb them in their relations to their own members, or in so far as the public may be affected by them, or those who are affiliated with them.

Charles Reade, the famous English novelist, in his powerful novel, "Put Yourself in His Place," placed before the world some of the evils of these associations of his day and time, and which "expose" had no small share in the passage by the English Parliament of laws and enactments, the beneficent results of which remain to-day, just as his, probably, more powerful novel "Hard Cash," resulted in a complete reformation of the Lunacy Law of England: but this article is chiefly concerned with viewing these associations from a purely legal standpoint, and no vantage ground seems to be better adapted for the purpose than the latest important judicial exposition of the questions involved, viz., the case of the *Hitchman Coal and Coke Company* v. *Mitchell,* et al., decided January 18, 1913, by the United States District Court, for the Northern District of West Virginia, decreeing that a perpetual injunction issue restraining the defendants from the acts complained of.

The plaintiff is a coal mining operating company, owning and operating mines in the West Virginia district, and employing miners who are affiliated as members of the United States Mine Workers, of which association the defendants are officers. It appeared from the evidence that the more valuable natural conditions of superior veins of coal, roofing, methods of mining and superior quality of coal, enabled these West Virginia oper-

ators to mine coal cheaper than the operators in Western Pennsylvania, Ohio, Indiana and Illinois, and this state of affairs resulted in the defendants approaching the competing operators in the last mentioned states, and proposing an agreement, which was entered into subsequently, under which defendants would unionize the West Virginia miners, (who at that time were non-union), and compel them, as members of the union, to obey the rules and by-laws of the United Mine Workers, and thus do away with the unequal competition in favour of the West Virginia operators. This was in 1898, and for a period of fourteen years, and with an expenditure of hundreds of thousands of dollars, and at the cost of human lives sacrificed, they were still unsuccessful in their attempts at unionizing the West Virginia miners, when matters were brought to a crisis by the plaintiff, in the above case, obtaining a temporary or interim restraining order, which, by the decree of the above court, was made perpetual.

The learned judge in his opinion first, by a course of clear, forcible, and logical reasoning, aided by a legal exposition and consideration of the law involved, attempted to shew and did shew, what part of the English common law became part of the law of the State of Virginia, at the time of the American Revolution in 1776, and how much of that law remained in force in the said state, when the first state constitution of West Virginia was adopted in 1861 and 1863, (what is known now as West Virginia, having previously formed a part of Virginia), and remained unchanged at the time of the commission of the alleged acts complained of.

The court gives an elaborate resumé of the conditions of labour existing at the time of the enactment of the first statute in England affecting labour and known as the "Statutes of Labour" and passed in 1349 and 1350, in the reign of Edward III. It fixed the amount of wages for labour during the summer months, and empowered justices of the peace to fix the amount for the winter months. Then came the Statute of Apprentices, enacted in 1563, which remained the law for two hundred and fifty years and was repealed in 1813, but during that whole period, it, as

far as its enforcement was concerned, was a dead letter; so much so, that for the statutory regulations, was substituted a system of private contractual relations between master and servant, or employer and employee. This statute was in force two centuries when it was construed as affecting only those industries existing at the time of its passage in 1563.

The next enactment on the subject in point of time, was the "Combination Act" passed in 1797, and re-affirmed in 1800, making unlawful any combination to secure an advance in wages, changing or decreasing the hours of labour, or preventing an employer from hiring anyone else, or whom he chose to hire, or inducing workmen to leave their work, or to attend a meeting to advance any of these purposes.

In 1825 was enacted "The Molestation and Obstruction Act," and in 1859 an Act was passed more clearly defining "Molestation and Obstruction," as contained in the Act of 1825, and this defining Act of 1859 was construed in 1867, by the Queen's Bench, through Cockburn, C.J., as follows:—"I am very far from saying that the members of a trade union, constituted for the purpose not to work except under certain conditions, and to support one another in the event of being thrown out of employment, in carrying out the views of the majority, would bring themselves within the criminal law, but the rules of the society would certainly operate in restraint of trade and in that sense be unlawful."

Through the efforts of the labour unions themselves was enacted in 1871 a provision that "the purposes of any trade union shall not be deemed to be unlawful so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise."

The above Act was the result of long agitation of the subject of trade unions and their relations to the public in particular, which brought about the appointment by Queen Victoria, in 1857, of a Royal Commission, which made ten preliminary reports, its final one being on March 9, 1869; as a result, the Government introduced a bill legalizing these unions, in so far

as they, being combinations, were in restraint of trade and also contained clauses making certain acts criminal.

From 1871 to 1906 Acts were passed which were either modified or repealed, until "The Trade Disputes Act, 1906," was enacted, and which provided that it and the Acts of 1871 and 1876 together could be cited, as the "Trade Union Acts of 1871 in 1906," and which embraces at this time all the statutory laws of England touching trade unions.

Two trite and pertinent questions arise in the consideration of all the above statutes as to reasons for their enactment. The "Molestation and Obstruction Act" of 1825, made lawful any peaceful persuasion to induce workmen to abstain from working in order to raise wages. Was this enactment absolutely necessary to validate such a purpose because the same persuasion under the common law was unlawful? And was the Act of 1871, as to punishment of members of a trade union, enacted to change a different rule under the common law?

From the rather complex and involved legislation of to-day in England, it is hard to arrive at a correct estimate of the nature and character or status of these unions in that country. Their position in the political fabric seems, to say the least, rather anomalous. In the *Taff Vale* case, *Taff Vale R. Co.* v. *Amalgamated Society*, [1901] 1 K.B. 170, in discussing the Trade Union Act of 1871, Farwell, L.J., says: "A trade union is neither a corporation nor an individual nor a partnership between individuals. It is an association of men which almost invariably owes its legal character to the Trade Unions Act, 1871-1876, and the legislature in giving a trade union the capacity to act, by agents, has, without incorporating it, given to it one of the essential qualities of a corporation." See the same case in appeal, [1901] A.C. 426.

Previous to 1906 it was clearly unlawful for a trade union or its officers, to induce, persuade, or procure workers to break contracts with their employers. This was distinctly held in *Quinn* v. *Leathem*, [1901] A.C. 495, and in *South Wales Miners* v. *Glamorgan Coal Company*, [1905] A.C. 239. The latter case

was an action for wrongfully and maliciously procuring, on the part of the Miners' Federation, its members in the mines to break their contracts of service with the company. The Federation's efforts were found to have been untainted with malice, but five "stop days" had been ordered, and that it was obeyed by over one hundred thousand men, each of the five times breaking their contracts with their employers. The lower court dismissed the action, the Court of Appeal reversed this judgment and awarded damages. Upon appeal to the House of Lords, the Court of Appeal was affirmed, and good faith was held no justification; "that to combine to procure a number of persons to break contracts is manifestly unlawful." This ruling is in accord with American cases, amongst them: *Tubular Rivet Company* v. *Exeter Boot & Shoe Company* (1908), 86 C.C.A. 648; *A. R. Barnes & Company* v. *Berry* (1907), 156 Fed. Reports, 72; *Thacker Coal Company* v. *Burke,* 5 L.R.A. (N.S.) 1091 and annotations; but section 3 of the English Act, 1906, provides that "An act done by a person in contemplation or furtherance of a *trade dispute,* shall not be actionable on the ground *only* that it induces some other person to break a contract." It would seem very evident from the context of the above quoted section of the Act of 1906, that it was passed with the direct purpose of wiping out the rule laid down in the *South Wales* case, and it is equally clear the section applies only to trade disputes existing between the particular employer and his employees, and could not be stretched to include within its provisions what is familiarly known as a "sympathetic strike," where the breaking of contracts is involved.

Another feature of the English legislation affecting trade unions is, the importance given the rules and by-laws that may be adopted by them from time to time; in order for them to benefit from the registration provisions (which is permissive and not mandatory), these rules must be filed with the registrar and all changes must be at once reported and printed, and copies furnished on demand to anyone on payment of a nominal fee. The purpose of this publicity is to make it apparent to

the public at large, just to what extent the union is lawful in its purpose and designs, and that courts in a proper case may determine its nature and character by an examination of such rules; hence, since the passage of this legislation, the English courts have been called upon to determine by such examination, whether some of these unions were within the pale of the law or not, and from these decisions can be evolved some very valuable information, as to what penalties and obligations can be enforced as in favour of these unions, and against the employers of their members or against the public interests. See *Chamberlain's Wharf, Limited* v. *Smith*, [1900] 2 Ch. 605; *Cullin* v. *Edwin*, [1903] 88 L.T. 686.

In the case of *Gozney* v. *Bristol Trade and Provident Society*, [1909] 1 K.B. 901, Channel, J., says:—"What I think has to be found to make the association illegal is that the members agree to submit their own action to the decision of others and to strike or not as directed. That would certainly make the society unlawful, and probably also it would be unlawful if the object is to combine for the purpose of putting pressure on employers and thereby to fetter their freedom of action."

It is part of the evidence in the *Hitchman* case, first above referred to (and this from one of the defendants therein, Green, and an officer of the United Mine Workers), that this particular union, during a period of fourteen years, "spent hundreds of thousands of dollars of the members' money," and "sacrificed human lives in their attempt to redeem that promise," to unionize the miners of West Virginia. What promise? The promise or arrangement made in 1898 at Chicago, with the mining companies of other States, who were producing coal at a disadvantage, and heretofore alluded to. Is it possible that such a conspiracy could be allowed to exist, much less to be carried into execution, in any country possessing to any degree a modicum of our boasted latter day civilization?

And is it a basis for complaint by these unions, that they are frowned upon unjustly by the courts, simply because the shield, or ægis of the law, is suddenly thrust between them

and their intended victims, with the warning "Thus far shalt thou go and no further?"

Many a worthy cause in the world's history has been prostituted to ignoble and unholy ends, and much of the opprobrium attaching to-day, and in the past, to these associations, is and was the direct result of such prostitution. It will not be amiss here to quote from the court in the *Hitchman* case:—"Before applying these principles to this particular organization and case, I cannot, in view of the extended quotations from labour leaders and advocates contained in the brief of counsel for defendants, but disclaim the sentiment expressed by such leaders, to the effect, that either the legislative bodies or the courts of this country, Federal or State, have been or are unfriendly to labour organizations. The contrary is true. The statute books are full of laws for the benefit of labour, to better their conditions, to insure their health, safety and their lives. Organized labour is entitled to all praise for the effective work done in aid of securing these laws, and the courts of the country have been prompt in fully and effectively enforcing such laws."

All labour unions, organized for lawful purposes, and striving to achieve those purposes by lawful means and procedure, are entitled to the protection of the law to the fullest extent; but, on the other hand, any and all combinations, labour or otherwise, organized for unlawful purposes, or being lawful in purpose, which are prostituted to unlawful proceedings and to the accomplishment of unlawful ends, should be required either to reform their unlawful purposes, cease from their unlawful procedure, or cease to exist. And no part of the body politic is or can be more vitally interested in the suppression of labour organizations, unlawful in purpose or proceeding unlawfully, than the members of such organizations lawful in purpose and procedure.

As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms which one person may exercise singly, many persons, after consultation, may exercise

jointly, and they may make a decree of their choice, and may lawfully act thereon for the immediate purpose of obtaining the terms required; but they cannot create any mutual obligation having the legal effect of binding each other not to work, or not to employ, unless upon terms allowed by the combination. Any arrangement for that purpose, whatever may be its purport or form, does not bind as an agreement, but is illegal on account of restraint of trade, and therefore void. Every party to it, who chooses to put an end to it, is thenceforward as free to claim his own terms for his own labour as if such arrangement had never been made, and any attempt to enforce, by unlawful coercion, performance of any such supposed agreement against a party who chooses to break from it, and labour or contract for labour upon different terms, is an attempt to obstruct him in the lawful exercise of his right to freedom to trade; and is thus a private wrong. It is also a violation of a duty towards the public—that is to say, of the duty to abstain from obstructing the exercise of the right to the free course of trade. A person can neither alienate for a time his freedom to dispose of his own labour or his own capital according to his own will; neither can he alienate such freedom generally and make himself a slave (see *Hilton* v. *Eckersley*, 6 Ell. & Bl. 47; see the argument of Hargrave in the *Negro Sommerset's* case, 20 State Trials, 23); it follows that he cannot transfer it to the governing body of a union.

In the relations of these organizations to the general public as consumers of the products of capital and labour, it must be admitted that, in the absence of special legislation such as that of England, and of doubtful constitutionality in a country under written constitutions, Federal or State, it is just as unlawful for the labourer to form a trust or monopoly as it is for capital to do so. The same rule of common law governs the one as the other, and in the United States, the Act of Congress, known as the Sherman Anti-Trust Law, is simply declaratory of the same principle. The latest construction of this Act, by the Supreme Court of the United States, in the *Standard Oil Com-*

pany v. *United States*, 221 U.S. 1, and *United States* v. *American Tobacco Company*, 221 U.S. 106, is that "it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in Interstate commerce." By the English authorities hereinbefore cited, it will be seen that the same doctrine of the "unreasonable restraint of trade, has been applied there as against these labour unions, and in regard to the decisions of the several states of the American union, it is to be always borne in mind that some of the states have enacted legislation touching these organizations differing in character from each other, and that their decisions may be found conflicting and confusing. For example, the State of New York has passed laws excepting trade unions from all restrictions on combinations and conspiracies imposed by other statutes, or by the common law, and other states have laws excepting them especially from the operation of their Anti-Trust Laws, but a Texas statute having a like effect has been declared unconstitutional by its Supreme Court. *National Cotton Oil Co.* v. *Texas*, 197 U.S. 115.

From the consideration of the review of the English Law and decisions as set forth by the learned court in the *Hitchman* case, the following conclusions were arrived at by the court in making the injunction against the United Mine Workers of America, perpetual: "That these union combinations must be considered in their relations to their respective members, to those who may employ such members, and to the public interest; that in their relations to their respective members, they cannot, even under the advanced legislation of England, undertake to require by oath, or otherwise, a surrender of the individual freedom of their members, and when they seek to do so they become illegal; that in their relations to the employers of their members, while they may use all peaceful efforts to advance their members' interests by aiding them to secure better wages, shorter hours, and better conditions, they cannot accomplish these ends by violence, coercion or intimidation. They may not, by common law, interfere with the contracts which their members have entered into with their employers, nor by any means induce

them to break such contracts, except where permissive legislation exists, such as the English Act of 1906. To break a legal contract is unlawful and therefore to persuade, or to induce, one to do this unlawful thing is itself unlawful, and these unions have no right, by intimidation or coercion, to destroy the inherent right which the employer has to control his property and to conduct his business in any lawful manner he may choose. Such employer may fix the terms and conditions upon which he will give employment, may employ whom he desires, may refuse to employ whomsoever he may wish not to employ, and, in the absence of contract, may discharge whom he pleases and refuse to discharge whom it may please him to retain; and it is entirely within the right of the union to advise its members, in the absence of contract on their part with the employer, to quit their labour for him; in other words, to strike, and to insist upon a definite term of employment before they go back to their labour; but neither the union nor its striking members have any right, by intimidation or coercion, to prevent other labourers or any of the members of the union itself, from taking employment under the employer's terms, if they so desire. They may, by reasoning and persuasion, under such conditions, induce its own members and others not to assume the employment, where the breaking of no contract is involved, but this is as far as they can go.

"In the relations of these unions to the public, it is to be remembered that while the membership of organized labour is great, the number of non-union labourers, as a rule, is many times greater, and it is the law's function and duty to fully, without fear, favour or partiality protect the rights of the latter as well as those of the former. These rights guarantee to the labourer the absolute right to join the union or not as he sees fit. The unions cannot, under the law, use any means of intimidation or coercion to compel him to do so. The limit of their right to do so is persuasion, and if he joins, they cannot compel his continuance. As a member he may withdraw when he chooses. The union members, as individuals, may voluntarily

determine not to work with non-union labourers if they so desire, and they can cease working themselves on that account, but they can do nothing in the way of coercion to compel either other union or non-union men to cease working on the one hand, or to prevent the employer from filling their places with other union or non-union men on the other. The right of the individual labourer to sell his labour, which is his property, in a lawful manner and upon such terms and conditions as he may himself determine for his best interests, must be upheld by the law, just as fully and freely as it is upheld in all the other relations of civic life, regardless of these labour unions."

The other conclusions of the court in the *Hitchman* case, were as follows:—"That this organization known as the United Mine Workers of America, is an unlawful one because of its principles as set forth in its constitution, obligation for membership and rules, which require its members to surrender their individual freedom of action, to require in practical effect all mine workers to become members of it whether desirous of doing so or not, to control and restrict, if not destroy, the right of the mine owner to contract with its employees independent of the labour union, to exclude his right to discharge in the absence of contract, whom he pleases, when he pleases, and for any cause or reason that to him seems proper, assumes the right on its part by and through its officers to control the mine owner's business by shutting down his mine, calling out his men on strike in obedience to their obligation to the union whenever the union officers deem it to be for the best interests of the union, regardless of the rights and interests of the mine owner and of his direct loss and damages, and such indirect loss and damage as may be inferred by him by reason of the resulting violation of contracts by him with others. I further conclude that it is an unlawful organization, because of its procedure and practices, in that it seeks to create a monopoly of mine labour such as to enable it as an organization to control the coal mining business of the company, and has by express contract joined in a combination and conspiracy with a body of rival operators, resident

in other states, to control, restrain, and to some extent destroy the coal trade of the State of West Virginia." *Adair* v. *United States,* 208 U.S. 161.

In the celebrated case of *Allen* v. *Flood,* [1898] A.C. 1, it was held by a majority of six to three, in the House of Lords, that no action lies against a trade union, by a dismissed workman for maliciously inducing his employer to dismiss him. In that case the trade union threatened a strike unless the workman who had violated a rule of the union was discharged, and the employer yielded to the threats; but three years afterwards, the House of Lords held in *Quinn* v. *Leathem,* [1901] A.C. 495, that a combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him, or not to deal with him, or continue in his employment, is, if it results in damage to him, actionable: in this case the employer recovered £250 from the president, treasurer and secretary and two members of the trade union. Act 34 and 35 Vict. ch. 32, entitled an "Act to Amend the Criminal Law," relating to violence, threats and molestation, contained various provisions for preventing the molestation of masters and workmen, to induce them to yield to particular combinations or associations. This Act has been repealed by "The Conspiracy and Protection of Property Act," 1875, 38 and 39 Vict. ch. 86, which amended the law as to conspiracy and breach of contract by workmen.

While to some extent legalized by the Acts 1871 and 1876, trade unions are put in the position of voluntary associations, and the power of the courts to interfere in their domestic affairs is restricted by section 4 of the Act of 1871, which denies the courts jurisdiction directly to enforce them or to award damages for breach of the following, viz.: agreements between members of a trade union, concerning the conditions on which each member as such, shall or shall not sell their goods, transact business, employ or be employed; agreements to pay a subscription or penalty to a trade union: *Mullett* v. *United French Society,* [1904] 91 L.T. 1331; agreements to apply trade union funds,

first, in providing benefits for members, *Rigley* v. *Connol,* [1880] 13 Ch. D. 482; *Cullin* v. *Elwin,* [1903] 88 L.T. 686; second, in furnishing contributions to an employer or workman not a member, in consideration of his acting in conformity with its rules; third, in discharging a fine imposed on any person by a court of justice; agreements between two or more trade unions; and it would seem that a member or his representative cannot sue a registered trade union to recover "sick pay." *Burke* v. *Amalgamated Society of Dyers,* [1906] 2 K.B. 583; and see *Russell* v. *Carpenters and Joiners,* [1910] 1 K.B. 506. There seems to be some uncertainty as to whether the fact that some of the rules of a trade union are in restraint of trade, if it is substantially legal, affects the rights of members to recover benefits. *Swaine* v. *Wilson,* [1890] 24 Q.B.D. 252; *Gozney* case, [1908] 24 Times L.R. 814. There is also some uncertainty as to how far the courts will interfere indirectly to enforce, inter se, the rights of trade union members. An injunction has been granted to restrain the application of funds contrary to agreement. *Wolfe* v. *Matthews,* [1882] 21 Ch. D. 194. In *Yorkshire Miners' Association* v. *Howden,* [1905] A.C. 256, it was held that section 4 of the Trade Disputes Act, 1906, did not bar an action to prevent misapplication of trade union funds by paying strike money, in cases not authorized by the rules of a trade union. It has been held that an injunction cannot be granted to restrain a trade union from expelling one of its members. *Chamberlain's Wharf, Limited* v. *Smith,* [1900] 2 Ch. 605; *Rigby* v. *Connol,* supra.

As regards the civil liability of trade unions, there was much discussion between 1871 and 1906 in England, as to whether or not trade unions were civilly liable for strikes or lock-outs; many controversies arose as to the court's power to restrain their activity by an injunction or actions in cases of controversy or malicious wrong, or to entertain actions against trustees or other persons representing the union, so as to make the funds of the union liable for the wrongs committed under the authority of the managers of the union. By 1906 it had been settled

that a combination of trades in their own interests is not actionable merely because it happens to affect other trades adversely, although the agreement may be unenforceable as between the parties to it because in restraint of trade. It was decided in the *Mogul* case, [1892] App. Cas. 25, that the courts had power to grant injunction or award damages against trade unions, in respect of breach of contract wrongfully procured by the acts of members or officials with the authority of the union. *Quinn* v. *Leathem*, [1901] A.C. 495; *Denaby Collieries, Ltd.* v. *Yorkshire Miners' Association*, [1906] A.C. 384. It was also held in the *Quinn* case, supra, that a combination to injure might be actionable, whether the acts of an individual were or not. The opinion expressed in the *Quinn* case, supra, that conspiracy and damage gave a cause of action even though the same acts by a single person would not be actionable has been over-ridden by section 3 of the Trade Disputes Act, 1906, which provides that an act done by a person in contemplation or furtherance of a trade dispute, shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person or within the right of some other person to dispose of his capital or labour as he wills. See *Conway* v. *Wade*, [1908] 1 K.B. 844.

In regard to the quasi-corporate liability of trade unions and their funds for tort, or for procuring breach of contract, the decisions in the *Taff Vale R. Co.* v. *Amalgamated Society*, [1901] A.C. 426, in *Quinn* v. *Leathem*, [1901] A.C. 495, *Gibbons* v. *Labour Unions*, [1903] 2 K.B. 600, *Reade* v. *Stonemasons*, [1902] 2 K.B. 732; *The South Wales* case, [1905] A.C. 239, which latter case is known as "The Stop Day Case," were absolutely overridden.

By section 4 of the same Act, which provides an action against a trade union, whether of the workmen or masters, or against any members or officials thereof, on behalf of themselves or all other members of the trade union in respect of any tortious act, alleged to have been committed by, or on behalf of the trade

union, shall not be entertained by any court. The exact effect of these cases last mentioned, upon actions against members or officials of trade unions who have committed torts or procured breaches of contracts in the course of trade disputes, has not been fully ascertained. The Act is considered not to apply on proceedings in respect of acts done before its passage. In *Bussy* v. *Amalgamated Society*, [1908] 24 T.L.R. 437, sec. 4, above referred to, was held to apply to all actions against a trade union for tort, but not to protect members or officials from suit as individual for torts, even if committed on behalf of the union. In *Conway* v. *Wade*, [1908] 24 T.L.R. 874, a threat to an employer as to what would follow if he did not discharge a man who had ceased to be a member of a trade union for non-payment of a fee, was held to have been in contemplation or furtherance of a trade dispute within section 3 of the Act of 1906. It would seem that an action against a member for tort would still lie except so far as excluded by section 3. *Flood* v. *Jackson*, [1895] 2 Q.B. 21. By section 5 of the Act of 1906, "trade disputes" means any dispute between employer and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or with the conditions of labour of a person and workmen, or all persons employed in trade or in industry, whether or not in the employment of an employer with whom a trade dispute arises. The change made in the law by this section does not affect any conspiracy for which punishment was awarded by statute, nor of the law as to riot, unlawful assembly, breach of the peace, or sedition, or an offence against the state or sovereign, (1875, ch. 86; see par. 2 and 3). There is one exception to this general statement, namely, that wilful and malicious breach of a contract of service or hiring, with knowledge that to do so will probably endanger life, or cause serious bodily injury, or expose valuable property to destruction or harm, is summarily punishable; and that wilful and malicious breach of contract by employees of authorities supplying gas or water is similarly punishable if the employees know, or have reasonable cause to believe, that it will deprive the consumers, wholly or in part, of their supply. Under the pre-

sent law of England, with the exception above stated, a strike or lock-out, even if it involves a breach of contract, is not criminal, unless it is attended by other acts which are criminal, per se.

A trades union or labour organization as now understood and considered, is a corporation of workmen having for its object the improvement of their industrial condition. It may consist of a few labourers with a mutual or common understanding with reference to a single purpose, or perhaps a formal organization with a large membership, widely scattered, but in both instances the status under the law is the same. Its compactness in the one case, nor its extensiveness in the other, give it, nor subject it, to no unusual or peculiar rights or liabilities.

Whether a combination of this character, or either of them, was ever criminal, per se, is a question that has never been satisfactorily or definitely settled.

In an early decision in 1721 defendants were indicted for conspiracy to raise their wages by a pre-arranged plan not to work. An objection was raised, arresting judgment, that the defendants were not compelled nor obliged to work, and in answer the court said, it is reported, that they were indicted for conspiracy and not for refusing to work, and that a conspiracy of any kind was illegal even if the subject-matter of the conspiracy was lawful for them, or any part of them, to do in the absence of conspiracy to do it. *Rex* v. *Journeymen Tailors,* 8 Mod. 11. The authority of this case has been questioned on account of the notorious inaccuracy of the reporter and the case, as stated, has certainly little to recommend it. See *Stevedores* v. *Walsh,* 2 Daly (N.Y.) 1. What one man may lawfully do in pursuance of a legal right, more than one may do together. The number who unite to do an act cannot change its character from lawful to unlawful. To constitute a criminal conspiracy the agreement must have in mind the doing of something illegal as a means or as an end. As to conspiracy of trade unions or labour combinations in England, see Conspiracy and Combinations Act, 1875, (38 and 39 Vict. c. 86), for the full text of which see note in *Gibson* v. *Lawson,* [1891] 2 Q.B. 549.

Combination means power and power implies ability to command or control, and the advantages which result from concerted action when substituted for individual effort are too apparent to admit of discussion.

To gain control over the will of their employer, to secure the ability and power to dictate the terms and conditions of their employment is the one purpose of all labour organizations, resulting whether mediately or immediately, in the maintaining or increasing of the wages paid their members.

For the reason that such an ultimate object was considered at one time to be against public policy these combinations have been held to be illegal and to subject these concerned to indictment for criminal conspiracy. The reasons and causes for this legal view may be found in the economic ideas which shaped and rounded out the political polity of former times. It was contended that the public interest required trade should be protected from *restraint* and the price of commodities, and particularly of necessaries, should be regulated by the law of supply and demand.

Any combination by which the price was increased, whether a combination or masters limiting the output of an article, or otherwise, or of workmen by compelling an increase in wages, was held to be unlawful as in contravention of public policy, and in restraint of trade.

But these views for the protection of trade have in recent years been considerably modified by certain exceptions, as our industrial progress has rendered no longer necessary a specific application of the above principle, and the most notable exception, perhaps, is that of labour organizations.

This is due in England to the passage by Parliament of the Act 34 and 35 Vict. c. 32, resulting from the report of a commission which itself was the outcome of the dissatisfaction over the conviction in the case of *Rex* v. *Druitt*, 10 Cox C.C. 600.

In Canada the change or departure was marked by the passage of the Act 35 Vict. c. 30, and known as "The Canada Trade Union Act," and in the United States, the exception in favour

of trade unions is one largely due to the action of the courts themselves. *Thomas* v. *R.R. Co.*, 62 Fed. Rep. 817; and the Court of Appeals of the State of New York held in the case *Curran* v. *Galen*, 152 N.Y. 33, "the organization or corporation of workingmen is not of itself against any public policy, and must be regarded as having the sanction of law, when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate." And a by-law fixing the wages at which the members of a trade union shall work and giving an action for a penalty, is valid. *Stevedores* v. *Walsh*, 2 Daly (N.Y.) 1, and it also has been held to be not illegal for workmen to form an association and agree in furtherance of its object not to teach others their trade unless by consent of the association. *Snow* v. *Wheeler*, 113 Mass. 179.

Turning to the consideration of the means by which a labour combination may lawfully inflict damage upon an opponent, it is very plain that if the damage is the result of the exercise by the members of the labour union of rights which they possess as individuals, no legal wrong is done. The law takes no cognizance of every wrong which may be inflicted, because it invests men with certain absolute rights, and if by the exercise of these rights other men suffer, it is an unfortunate consequence which must be borne without complaining. This leads to the consideration of what absolute rights labourers as members of trade unions enjoy. The first right, to strike, is naturally the result of the control of their own labour. However slow the law of England may have been to recognize the rights of labourers, it is now well settled there and established in the United States, by the fundamental law, that a labourer may, with or without reason, decline to work for anyone or with anyone, and the damage which such person may sustain as a result is immaterial, for the right of the labourer to withhold his labour is absolute, and is not qualified by whatever the effect of the exercise of this right may have upon others, or even by the fact that an injury was contemplated or intended. If one labourer enjoys this right he does not lose it when acting with others, hence it follows, that a strike, that is the simultaneous refusal to work by a body of

workmen, is not per se unlawful. Perhaps if the men were bound by contract of which the strike was the violation, it would present a different question, but if the men might lawfully quit, the fact that they collectedly availed themselves of their right cannot render the act criminal. *Com.* v. *Hunt,* 4 Met. (Mass.) 134; *Curran* v. *Treleaven,* [1891] 2 Q.B. 560.

Another absolute right, which labourers in common with other individuals may enjoy, is the exercise of their power of persuasion, if the appeal be not directed to the accomplishment of some unlawful purpose. The principle which governs the cases which holds that interference with contract relations is unlawful, stands upon a peculiar ground. It is not unlawful for strikers by persuasion to cause employees to leave the service of their employer, or to dissuade other workmen from seeking employment from him. In the case of *United States* v. *Kane,* 23 Fed. Rep. 748, the court said, "The defendants may lawfully persuade the workmen of the plaintiff to abandon the employment in which they were engaged, as long as they use only argument or reason and avoid the use of threats, injury or violence, or any other unlawful act." See *Richter* v. *Tailors' Union,* 11 Ohio, Dec. 49.

Another absolute right of the labourer is to refuse to trade with a person absolutely or contingently. The admission of this right, with the other two, settles the right of a labour union, to use against an unyielding employer, the means of inflicting injury, which from its origin is called a "boycott"; this is the refusal of the members of the union to have any dealings with the employer or with a person who deals with him. So long as strikers employ no other means to deter others from dealing with the employer, except persuasion and withdrawing their own patronage, there is nothing illegal or criminal in their action. *Bohn Mfg. Company* v. *Hollis,* 54 Minn. 223; *State* v. *Glidden,* 55 Conn. 76.

The case of *Allen* v. *Flood,* [1898] A.C. 1, has been followed in Canada: *Perault* v. *Gauthier,* 28 Can. Supreme Court, 241; and has also been followed in those jurisdictions of the United

States, where it is held that malice is no element of tort. *Clemmitt* v. *Watson*, 14 Ind. App. 38.

In New York the question may be said to be undecided, though a late decision of the Appellate Division of the Supreme Court has been rendered conforming to this view. *Curran* v. *Galen*, 152 N.Y. 331; *Davis* v. *Engineers*, 28 N.Y. App. New York Appellate Division 396; *Protective Association* v. *Cumming*, 53 N.Y. Appellate Division, 227; but in Massachusetts, on a state of facts similar to those in *Allen* v. *Flood*, supra, it was held that an action will lie. *Plant* v. *Woods*, (Mass. 1900) 57 N.E. Rep. 1011. It has also been held in Massachusetts, that if the members of a labour combination, by striking and refusing to return to work until a penalty imposed by the union upon the employer is paid, force the employer to pay such penalty, he may maintain an action for its recovery. *Carew* v. *Rutherford*, 106 Mass. 1.

M. F. B. KENNEY.

MECHANICS' LIENS.

The rights of lien holders in the percentage required by the Mechanics' Lien Act to be retained by owners has been the subject of a good deal of litigation, and some difference of judicial opinion.

In the recent case of *Price* v. *Rathbone*, 4 O.W.R. 602, the Court of Appeal has determined that a sub-contractor, though not a wage earner, is entitled to a lien on the percentage in priority to any right of set-off the owner may have against the contractor by reason of his default in the performance of his contract, and in arriving at that conclusion have virtually overruled *Farrell* v. *Gallagher*, 23 O.L.R. 130; and have followed in preference *Russell* v. *French*, 28 Ont. 215. The latter case was decided in 1898, and in 1905 it was discussed by Mr. Hodgins, K.C. (now Mr. Justice Hodgins), in a very able article to be found ante vol. 41, p. 733.

The conclusion at which the learned writer arrived was that *Russell* v. *French* was not a correct exposition of the statute.

Those who favour that view may be therefore inclined to doubt the soundness of the recent deliverance of the Court of Appeal.

The broad question is: does the statute as it now stands give to sub-contractors, not being wage earners, a lien on the percentage required to be retained by an owner so as to intercept the latter's right to set off against it any counterclaim he may have against the contractor, by reason of his default, if any, under the contract, or for any other cause? The Court of Appeal have practically answered that question in the affirmative.

It may be here remarked that the earlier statutes dealing with Mechanics' Liens up to the year 1896 required the percentage to be retained on "the price to be paid" whereas since 1896 the Acts have required, and the present Act now requires, that the percentage shall be retained on the value of the work and materials actually done and furnished. *In re Cornish*, 6 Ont. 259, Boyd, C., and Ferguson, J., held that the Act prior to 1896 though requiring the percentage to be retained on "the price to be paid" really meant not the whole price to be paid but the price to be paid for the work and material actually done and furnished, which seems to be, in effect, importing into the Act a limitation which it did not in fact contain.

Might not the true distinction between the two Acts be thus illustrated: Under the Acts prior to 1896, if an owner made a contract for work and materials to the amount of $100, the $100 would be "the price to be paid" irrespective of whether work to that amount was done or not, and on which the percentage must have been retained; under those Acts the owner might validly pay to the contractor, on the making of the contract $90, and on the remaining $10 sub-contractors would have a lien, provided it was earned, but if the contractor never earned the remaining $10, no sub-contractor under him would have any lien thereon.

But under the present Act an owner entering into such a

contract is not protected if he pay $80 down. He must retain for every dollar's worth of work and materials done and furnished by a contractor, twenty cents; and on its being so retained all sub-contractors under that contractor, whether wage earners or otherwise, have a lien thereon.

It must be remembered that the Acts prior to 1896 expressly provided that, save as therein provided, the lien "given by the Act should not attach so as to make the owner liable to a greater sum than the sum payable by the owner to the contractor," and that those Acts had no provision making the owner liable for more than he owed, except inferentially, where he made payments beyond the ninety per cent. and they gave a lien on a percentage which might never in fact be earned. The present Act, 10 Edw. VII. c. 69, s. 10, contains a like provision as to the owner not being liable for more than he owes to his contractor, but sec. 12 (3) gives sub-contractors now a specific lien on the percentage which cannot come into existence until it has actually been earned, which serves to constitute a very important difference between the two Acts. But it has been said, with a good deal of reason—Granted that all sub-contractors have a charge upon the percentage, what is there in the Act which gives them any priority in respect to their lien over the equitable rights of the owner as the holder of the fund? Sub-contractors may, as under the former Acts; have a charge, but it is a charge impliedly subject to the equities which subsist between the holder of the fund and the person legally entitled thereto. Admit that the owner becomes trustee of the twenty per cent., can he be required to part with its possession until his just claims against his cestui que trust have been satisfied? On the other hand it may be argued that the statute has given a statutory right in that fund to the sub-contractors, and no subsequently accruing rights of the owner can intercept that statutory right. That is practically the view of the Court of Appeal and we are inclined to think that no fault can well be found with that conclusion. It is somewhat similar to the case

of a first mortgagee making further advances, after he has notice of a subsequent mortgage. Such advances cannot be tacked to his first mortgage to the prejudice of the subsequent mortgagor; and it is not unreasonable, nor unjust, that subsequently accruing equities of an owner shall not prejudice or affect the rights of lien holders whose liens have attached before such equities have arisen.

The argument founded on s. 15 (4), which expressly provides that as against liens for wages, the owner is to be precluded from applying the percentage to the completion of the contract or for any other purpose, or to the payment of damages for non-completion of the contract by the contractor or sub-contractor, or in payment or satisfaction of any claim against the contractor as sub-contractor, was duly considered by the Court of Appeal and notwithstanding the contention that there being this express provision in favour of wage earners and no such provision in favour of other sub-contractors, such other sub-contractors are not entitled to the same protection in regard to the percentage as wage earners, the Court held that they were.

The Court of Appeal regard this provision as not affecting the other provisions of the Act which they hold are sufficient to protect the liens of other sub-contractors from being intercepted by counter claims of the owner against the contractor, though not expressly provided for in the Act. The provision in favour of wage earners the Court of Appeal regarded as directed to cases where there are no progress certificates in which there may be nothing payable to the contractor, except the ultimate balance. This last suggestion as to the supposed meaning of s. 15 (4) does not appear to us to have any good foundation. The percentage fund in no way depends on the existence or non-existence of progress certificates; it arises automatically as the work and materials are actually done and furnished altogether irrespective of progress certificates or payments to the contractor thereunder, and for every dollar's worth of work and materials done and furnished the owner has to lay aside twenty

cents of the price for the benefit of sub-contractors, if any. The true reason for the courts' decision therefore, would seem to be not that s. 15 (4) is intended to apply to some special state of facts in which wage earners are intended to be specially benefited, but that such provision is in fact redundant and that the Act without it would have to be construed as if it contained it.

THE LAW OF SUPPORT FOR LAND.

Lord Haldane, in his judgment in the case of *Howley Park Coal and Cannel Company* v. *London and North-Western Railway Company* (107 L.T. Rep. 625; (1913) A.C. 11, at p. 25), recently pointed out that the proposition that the right of support for land is an incident of ownership was one of the few propositions which the learned judges who took part in the decision of the great case of *Dalton* v. *Angus* (44 L.T. Rep. 844; 6 App. Cas. 740) were agreed upon. This is a striking comment on the state of our law of support.

It is only a little over thirty years ago that *Dalton* v. *Angus* was decided. The question in that case might be described as rudimentary. It was heard before the House of Lords in November, 1879. But the law was in such an unsatisfactory state that it was found necessary to co-opt seven judges—viz., Baron Pollock and Justices Field, Lindley, Manisty, Lopes, Fry, and Bowen—and before these judges the case was again heard in the following year. Five specific questions were put to them, but in substance there was only one point—viz., whether after twenty years' enjoyment of support by a building from adjoining land the owner of the building could claim as a right the continuance of the support for his building. In due course—for time was desired to consider the questions—their Lordships delivered their opinions; and then Lords Selborne, L.C., Penzance, Blackburn, and Watson delivered their judgments. Thus we find in effect the judgments of eleven of the highest legal authorities of the day addressed to one short question. To these we must add the judgment of Mr. Justice Lush, who tried the case in the first instance at assizes, those of Chief Justice Cockburn and Mr. Justice Mellor in the

Queen's Bench Division, and those of Lord Justices Cotton, Thesiger, and Brett—in all, seventeen judges.

The case of *Dalton* v. *Angus* was a case of an easement of support. But rights of support are not all easements. The fundamental right of support is the one referred to by Lord Haldane in the opening lines of this article—viz., the right which every owner of land has to have his land supported by that of his neighbour, or, in other words, the right of preventing his neighbour letting down his land by excavations in that neighbour's lands.

The law of support has been quite unnecessarily confused by the free use of the terms "vertical" and "lateral" support. On principle, there is no distinction whatever between these two forms of support. Ownership of land may take the form of ownership of the surface and everything that is above and below it. This is the usual form of ownership. Or it may take the form of ownership of a stratum, as, for instance, where a man owns the surface, while another owns the minerals. Or twenty strata, one beneath the other, may be owned severally by as many owners. No doubt, in the common form of ownership, vertical support has no cogency whatsoever, for the vertical support is afforded from the owner's property itself. In the second form of ownership mentioned above, lateral support has little cogency, vertical support being all-important. Yet the principle is the same, and it is now well established that, just as much as a man has a natural right to lateral support for his land from the land of his neighbour (as to which see *Dalton* v. *Angus sup.*), so also has the owner of the surface a natural right to vertical support from the minerals lying underneath his land (*Davis* v. *Treharne*, App. Cas. 460), and the owner of a substratum has a natural right to vertical support from other substrata below his property: (see *Butterknowle Colliery Company* v. *Bishop Auckland Industrial Co-operative Company*, 94 L.T. Rep. 795; (1906) A.C. 305, at p. 313).

Although a great deal may be urged against the wisdom of our law in this respect, and great inconvenience and hardship often result from the rule, it is now well established that the law

gives no natural right of support for land weighted with buildings. This was the law centuries ago (see *Wilde* v. *Minsterley*, 1639, 2 Roll. Ab., Trespass, pl. 1; *Palmer* v. *Fletcher*, 1663, 1 Sid. 167), and it is the law to-day: (*Dalton* v. *Angus*, *sup*). But it ought to be observed that where land incumbered by buildings is deprived of the support afforded it by other land of another owner, it is still open for the owner of the buildings to recover from the other damages for the deprivation of support, if it can be shown that the weighted land would have subsided for want of support whether the buildings were upon it or not: (*Brown* v. *Robbins*, 4 H. & N. 186; *Bell* v. *Love*, 48 L.T. Rep. 592; 10 Q.B. Div. 547; *Manchester Corporation* v. *New Moss Colliery Limited*, 93 L.T. Rep. 762; (1906) 1 Ch., at p. 290).

In the same way as there is no natural right to support for land weighted by buildings from adjoining or subjacent land, neither is there any natural right to support for the buildings of one owner from the buildings of his neighbour: *Peyton* v. *London Corporation*, 1829, 9 B. & C. 725. It has even been laid down that where two houses are so situated that one derives support from the other, the owner of the second, if he desires to pull down the house, need not take active steps to protect the other, as, for instance, by shoring it up: *Southwark, &c., Water Company* v. *Wandsworth Board of Works*, 79 L.T. Rep. 132; (1898) 2 Ch. 603, at p. 612).

The hardships which would follow were the foregoing natural rights of support the only security for the protection of owners of landed property from subsidence or disturbance caused by the excavations of their neighbours, have been met by the recognition in law of easements of support. Thus, a right, in the form of an easement, may be acquired, as we have already pointed out, to the continuance of the support afforded to houses by the adjoining land of another person: *Dalton* v. *Angus*, *sup.*). So also a right may be acquired to the continuance of the support afforded to a house by the adjoining house of a neighbour: *Lemaitre* v. *Davis*, 46 L.T. Rep. 407; 19 Ch. Div. 281; *Waddington* v. *Naylor*, 60 L.T. Rep. 480). These rights may be acquired like other easements—viz., by express or implied grant or by prescription: *Dalton* v. *Angus*, *sup.*).

Returning to the natural rights of support, it is sometimes said that an implied right of support arises on the severance of land in point of title. Thus, it is sometimes said that where the surface becomes severed from the minerals underlying it, the grantee of the minerals impliedly grants, in the instrument of severance, a right of support to the surface from the minerals beneath it. The better view, however, appears to be that the surface owner acquires as of common right a right of support for his property in its natural condition; not because of any implication on the grant, but from the mere fact of the natural relative positions of the properties: see *per* Lord Macnaghten in *Butterknowle Colliery Company* v. *Bishop Auckland Industrial Co-operative Company, sup.*, at p. 313. Lord Haldane, in the recent case (107 L.T. Rep. 625, (1913) A.C., at p. 18), said he did not like the phrase "implication attached to a common law grant," but that the right to support is a natural right of property, and there is a natural obligation on the owner of land not to use his own property so as to injure that of his neighbour.

It is, however, clear that by the instrument effecting a severance of the surface and the underlying minerals a right may be given of violating the common law right of support which would otherwise be enjoyed by the surface owner. Whether this right of interfering with support is given or not is in all cases a question of construction of the instrument of severance, whether that instrument be a lease, a conveyance, or even an Act of Parliament. The authorities on this point are very numerous, but they all tend to show that there is a paramount rule of construction to be observed—viz., that very clear words are necessary to take away the right of support (see, *e.g.*, *Butterknowle Colliery Company* v. *Bishop Auckland Industrial Co-operative Company*, 94 L.T. Rep. 795; (1906) A.C. 305); and the same principle of construction applies in questions of support between the owner of the upper of two subterranean substrata and the owner of the lower substratum: *Butterley Company Limited* v. *New Hucknall Colliery Company Limited*, 99 L.T. Rep. 818; (1909) 1 Ch. 37; (1910) A.C. 381).

The recent case in the House of Lords (107 L.T. Rep. 625; (1913) A.C. 11), furnishes another instance of the application of

this principle of construction. Their Lordships held that railway companies are entitled, as an incident of their ownership of the surface, to the natural right of support from minerals lying near their property, notwithstanding the mining sections of the Railways Clauses Act of 1845. It had been assumed—and this assumption was certainly stimulated by the language of many learned judges in the past—that the effect of the mining sections of that Act was to displace altogether all rights of natural support which would otherwise have existed in favour of the railway company. This assumption is right, so far as regards the minerals lying within the distance from the railway prescribed by the Act; but the House of Lords has now held that outside that distance the Act does not affect the natural right of support which the company necessarily acquires when it acquires the surface for its line.

It is somewhat surprising that so important a question should have been deferred for decision for nearly seventy years after the passing of the Act. But the decision is one affecting the law of support, and deferred decisions is one of the features of this branch of our law.—*Law Times.*

Much has been said of recent years as to the prevalence of the crime of perjury. Judges and journalists have often had occasion to call attention to this evil, but no adequate remedy appears to be in sight. That as much as possible should be done goes without saying. As an illustration of one way of dealing with it and the most obvious was the prompt action of the Chief Justice of Manitoba at a trial before him, some months ago, when he directed the arrest of a witness who had in his opinion been guilty of the most flagrant perjury. The sheriff was at once sent for and the witness taken into custody during the progress of the trial. The learned Chief Justice pointed out that perjury was becoming so common an occurrence in the courts that some drastic means must be taken to stamp it out. Prompt action like this will have beneficial effect.

REPORTS AND NOTES OF CASES.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] WRIGHT *v.* BENTLEY. [March 3.

Auction sale—Sale of horse—Fraudulent circumstances—Employment of puffer—Repudiation of purchase—Reasonable time allowed for—Question of fact.

In an action brought by plaintiff on a promissory note given by defendants for the purchase price of a horse sold by plaintiff at auction the evidence shewed that the sale was made under fraudulent circumstances, the horse being wholly unfit for the purpose for which defendants required it and for which plaintiff prior to the sale represented it would be suitable, and plaintiff's son, who was unknown to defendants, having made a number of bids at the sale running the price of the horse up to a sum far in excess of its value.

Held, that plaintiff could not recover.

Held, further, that defendants were entitled to a reasonable time to determine whether they would repudiate the purchase and return the horse or not, that what is a reasonable time is a question of fact depending upon the circumstances, and that under the circumstances shewn by the evidence the period from October 15th, 1909, when the sale was made, to November 27th following, when the horse was returned, was such reasonable time.

Putnam, for defendant, appellant. *McLellan,* K.C., for plaintiff, respondent.

Full Court.] [March 3.

CHESLEY *v.* BENNER.

Bail bond—Condition—Collection Act—Appearance for examination under—Words "final judgment"—O. XIV.

Where a bail bond was conditioned for defendant's appearance for examination under the provisions of the Collection Act, pursuant to an order for his examination to be made within 30 days of the entry of final judgment in the cause.

Held, that the order for leave to enter final judgment granted by a judge at Chambers under the provisions or O. XIV. was not the final judgment to be entered in the cause referred to, and that defendant and his sureties were liable notwithstanding the order for examination under the Collection Act was not made until more than thirty days after the date of the order giving leave to enter final judgment.

Mellish, K.C., for appellant. *J. E. Ralston,* for respondent.

Province of Quebec.

KING'S BENCH.

Archambeault, C.J., Trenholme, Lavergne, Cross and Gervais, JJ.] [Feb. 22.

REX *v.* EAVES (No. 2).

(9 D.L.R. 419.)

Usury—By discounts—"Lending"—Who is a "money lender"—Criminal law—Limit of rate.

Held, 1. The offence of "lending" money at a greater interest than is authorized by the Money Lenders Act, R.S.C. 1906, ch. 122, for which a money-lender may be indicted under s. 11 of that statute, includes discounts made contrary to s. 6 thereof which in terms prohibits a money-lender from stipulating for, allowing or exacting on any negotiable instrument, contract or agreement, concerning a loan of money the principal of which is under $500, "a rate of interest or discount greater than 12 per cent. per annum."

2. A person is shewn to be a "money-lender" within the Money Lenders Act, R.S.C. 1906, ch. 122, if it be proved that he discounted promissory notes at a prohibited rate at various times each of less than $500 and so within the statute, although all for the same customer.

3. A person who is a money-lender within the terms of the Money Lenders Act, R.S.C. 1906, ch. 122, is guilty of a criminal offence under sc. 11 of that Act if he discounts for the customer at one time several notes made by various other persons maturing at various dates for less than $500 each, although the notes aggregate more than $500 and the net amount of the advance after deducting the discount was also more than $500, where the discount charge was separately computed and retained on each note

at a rate of more than 12 per cent. per annum, if there was no contract of open credit and the discount was made directly upon such notes without the customer himself giving his own note for the gross amount exceeding $500 as the subject of discount with the smaller notes as collateral only to the advance, so as thereby to make the transaction a single one for more than $500, to which the statute would not apply.

N. K. Laflamme, K.C., for the Crown. *J. P. Whelan*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

Perdue, Cameron and Haggart, JJ.A.] [Feb. 24.

RE CRABBE AND TOWN OF SWAN RIVER.

(9 D.L.R. 405.)

Municipal corporations—Revocation of pool-room license—Right of town council to revoke—Right of licensee to be heard before town council.

Held, 1. A town council has the right to revoke a pool-room license, for an infraction of a by-law of the town by the licensee, where such by-law existed at the time of the application for the license, and where the infraction was expressly made ground for such revocation at the time of such application.

2. Where a town council, having the right to revoke a pool-room license for certain infractions of a by-law of the town, revokes the license, without giving the licensee a chance to be heard at a judicial hearing, such action is not illegal, where it appears that the town in question is a small place, and the pool-room one of the principal loitering places and one that may very quickly become notoriously objectionable, and the court is satisfied that, even if the members of the council did not have a knowledge from personal observation, there were sufficient grounds to justify their action, especially where there is no suggestion that the council acted arbitrarily or in bad faith.

Whitla, K.C., and *Scarth*, for plaintiff. *Rothwell*, for municipality.

NOTE.—A discussion of the subjects involved in this case appears in an annotation in 9 D.L.R. 411.

Book Reviews.

A Digest of the Law, Practice and Procedure relating to Indictable Offences, being "Archbold" abridged and alphabetically arranged. By ARTHUR DENMAN, Barrister-at-law and Clerk of Assize. London: Sweet & Maxwell, Limited, 3 Chancery Lane. Stevens & Sons, Limited, 119 and 120 Chancery Lane.

The first chapter of this very useful and handy book is designed for the assistance of circuit officers in the general routine of their business. The rest of the work is an abridgment of Archbold so well known to the profession. The aim of the author has been to reproduce in a compact form such portions of that monumental work as long experience tells him are the most likely to be referred to, and to omit such portions which are of less importance and only very occasionally called in practice. The compiler's long experience and intimate acquaintance with the numberless subjects connected with criminal law which come before Magistrates and at Assizes renders him peculiarly qualified to undertake this condensation. It is a most useful compendium and a time saver of great value. Its comparatively small cost puts it within the reach of all Court officers as well as of Students. Practising lawyers need it at any price.

A Practical Guide to Death Duties and to the preparation of Death Duty Accounts. By CHARLES BEATTY, Solicitor, of the Estate Duty Office. Fourth edition. London: Effingham Wilson, 54 Threadneedle Street.

This brings up to date all necessary information on the above subject in England. It will also be useful to those of the profession in this country who have to deal with what is known here as the Succession Duties Act, dealing with a tax yearly swelling to larger proportions, and which, though illogical and often very unjust, has come to stay.

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INHERITANCE TAXES UPON ESTATES OF NON-RESIDENTS.

A comparative study of the Inheritance Tax Laws of the civilized world has become, of recent years, a matter of importance to the legal profession, as well as to all interested in financial investments. The paper boundaries of States or neighboring countries have little meaning for the capitalist of to-day, when monster corporations take the world for their field of operation and gigantic fortunes extend their investments over entire continents.

While the mere taxing of inheritances is no novelty in legislation, yet within the United States such laws are the creation, roughly speaking, of the past twenty years. Representing as they do in many instances the views of first impression of legislators acting independently at places remote from each other, and unacquainted with this comparatively new form of taxation, they here and there display, as might be expected, both crudeness of conception and lack of harmony. Comparing the more modern with the earliest legislation, however, a steady and gratifying development is plainly apparent. This development is always in the direction of imposing progressive or graduated duties in place of the old flat rate of taxation, of favoring descendants and placing the heavier burdens on strangers and more distant relatives, of granting reasonable exemptions and fixing reasonable rates; and in an increasing deference paid to the rights of non-resident investors and a recognition of the duties of comity towards sister States. But some novel tendencies, less encouraging, obtrude themselves upon our notice, such as the actual or suggested employment of inheritance taxes for the purpose of limiting or preventing the transmission of great

accumulations of property, or of confiscating for the State all inheritances beyond a permitted amount.

This might tempt the student to digress so far as to consider whether laws of this general character are really in the public interest or whether they are purely socialistic and a distinct discouragement to the saving habits of a people; but any such consideration would be idle. This class of legislation is not a peculiar product of American democracy, whose aim is sometimes said to be to tax the rich out of existence, but is as firmly established in Europe as on this Continent. Indeed, it took its rise in Europe. So far as socialism (whatever the term may in these days mean) is concerned, the most monarchical country in Continental Europe is more prolific of legislation of a so-called socialistic tendency than any State in the American Union. Nor is Great Britain far behind.

In defence of these laws it may be said that there is no natural right by claim of which a human being should be permitted to influence the ownership of real or personal property for one instant after his death; that the sanction permitting him to designate the next possessor, or designating it for him, is merely a rule adopted by the public in order to obviate the inconvenience and disorder of property being left from time to time open to continual seizure, upon the death of its owner, by any chance finder; and that the community may with justice impose such tax upon the succession to ownership as it deems desirable: *Mager* v. *Grima*, 8 How. U. S. 490; *U. S.* v. *Perkins*, 163 U. S. 625. Whatever the reason advanced, it is at this day clear that these laws are too well established to be successfully opposed as unjust or unconstitutional. They are also too important. From taxes of this nature Great Britain derives ninety million dollars a year, or one fifth of her total revenue. Similarly, France collects over fifty million dollars, and the German Empire an even larger amount.

Thirty-eight States of the American Union, as well as Hawaii and Porto Rico, now possess Inheritance Tax Laws; every Canadian Province may also be included. In the operation of these

laws, the ancient maxim "mobilia sequuntur personam" has been, to a large extent and in most jurisdictions, set aside. It is still the common or statute law in most, if not all, of the United States that personal property is transmitted and bequeathed by will, and is descendable by inheritance on intestacy, according to the law of the domicile and not that of the situs; yet the rule has grown up in modern times that State legislatures have the power to deal with and tax the personal, as well as the real, property of non-residents, if actually and physically within their jurisdiction, and it is generally felt that such property, by reason of enjoying the protection of the local law, ought to pay its share towards the expense of the local government. The tax, however, is held to be not directly upon the property, but upon the succession: *Irdman* v. *Martinez*, 184 U. S. 578; *Magoun* v. *Illinois Bank*, 170 U. S. 283; *Moore* v. *Ruckgaber*, 184 U.S. 593; 104 Fed. Rep. 947; *U. S.* v. *Rankin*, 8 Fed. Rep. 873; *U. S.* v. *Hunnewell*, 13 Fed. Rep. 617; *U. S.* v. *Morris*, 27 Fed. Rep. 341.

A general family resemblance is borne by all this class of legislation. Thus, a common feature is the imposition of the tax, upon the death of an owner, (a) upon all real and personal property belonging to his estate and situated within the jurisdiction imposing the tax; and this irrespective of whether the deceased owner was domiciled within or without the jurisdiction; the tax being in this case based upon the physical presence of the property within the jurisdiction; (b) in the case of a resident domiciled within the jurisdiction, upon all personal property of the estate wherever situated; i.e., whether within or without the jurisdiction; (c) upon stock in corporations; this stock is ordinarily taxed in the State where the late owner was domiciled; but very frequently is taxable as well in the State where the corporation is incorporated, since this stock is very commonly deemed property situated in both States: it may even be taxed also in the State where the corporation owns any property or does any business or where the certificates of ownership happen to be found. There may thus be, in this case, double

or treble taxation. However great the hardship or natural injustice of this repeated taxation of the same property, the Supreme Court of the United States has held it legal: *Blackburn* v. *Miller,* 188 U. S. 189. The State of the corporation usually holds the corporation itself responsible for the collection of this tax under a penalty. The same rule obtains with regard to registered bonds of corporations. They are invariably taxed in the State of domicile; but not infrequently also in the State of incorporation, as well as in the State where they are physically found.

As an indication of the practical result of the present system, let us assume a very common case—that of a resident of the State of New York, who dies leaving an estate invested principally in the stock of one or two well known railroads and of large industrial corporations. This State has since recanted many of its legislative heresies, but the ill effects are still widely felt. Administration of the estate is, of course, taken out in New York, the jurisdiction of domicile; yet it will be found that five or six States have to be dealt with by the personal representatives, in place of one. Thus New York, the State of domicile, first imposes and collects the full tax upon the entire estate. Until a recent amendment, it allowed the estate no deduction whatever for any other inheritance taxes which may be demanded in other States. But before the administrator can deal with this stock, he must present his credentials and have it transferred to him upon the books of the Company. The latter will not permit the transfer until satisfied that all collectible inheritance taxes have been paid, since the statute law makes it responsible for the payment. The administrator may then discover that an American transcontinental railroad holds charters from perhaps three, four or five different States, although nothing of this appears on the stock certificates; thus the Wabash Railroad Company is incorporated under the laws of Ohio, Indiana, Michigan, Illinois and Missouri. This frequently gives rise to difficulties of great practical importance to the estate of the foreign investor. One might conjure up further complications should

the taxing authorities of different States rule differently on the subject of domicile, which lies at the very threshold of the enquiry, and is often one of difficulty. With all these jurisdictions must the unlucky administrator run the gauntlet, being compelled, in some cases, to apply for ancillary administration in various States for no other reason than the settlement and payment of the inheritance tax of the particular State in question. In many States, it is the practice to require the foreign executor or administrator to file a complete inventory of the estate, as well as certified copies of the original probate records, before official consent is given to the transfer of the stock. This may involve an expense of no small amount, apart from the tax itself. Yet the executor is helpless, since non-compliance with the exactions of State officials entails inability to transfer the stock. In the case of some of the large trust corporations, it will be found that the corporation itself sometimes adds another court to the already sufficient number by demanding certified copies of the will and letters, and by itself independently determining the regularity of the probate proceedings, the power of the personal representatives to sell and the propriety of the transfer. However arbitrary and unauthorized this may be, the condition exists, and the delays in transfer occasioned thereby may, in a falling or panicky stock market, result in serious loss to the estate.

These admitted evils, and the distinct discouragement they offer to the investment of foreign capital in the United States have been often pointed out. Quite recently the U. S. Consul at Birmingham made this the subject of a remonstrance to the Department of Commerce and Labor, and his statement of many cases of hardship coming under his official notice will be found in the Consular Reports. But the subject is not one of Federal jurisdiction. At the present time, there exists no Federal Statute taxing inheritances, this form of taxation being properly considered by the Federal Government as a war measure solely. Such a tax was in force, however, from 1862 to 1872; and again from 1898 to 1902. It may be resorted to at any time: *Knowlton* v. *Moore*, 178 U. S. 41.

The general features of the legislation are the same in all these statutes. There is found a distinction made between direct descendants and near relatives on the one hand, and collaterals on the other: the former being in some cases untaxed, and in all others visited with a much lighter tax than in the case of more distant relatives. The favored class of direct inheritances nearly always includes father, mother, husband, wife, child (including adopted child) and lineal descendants, and some States also admit brothers and sisters, the wife of a son or the husband of a daughter. Thirteen States exempt direct inheritances and tax only collaterals. Small inheritances are usually exempt.

On direct inheritances, a liberal exemption will generally be found allowed, sometimes as much as $10,000; beyond which the tax is fixed at a small percentage. On collaterals, the exemption is frequently $500, and the rate of taxation is five per cent., or more. The tax is, as a rule, determined on the amount of the inheritance considered by itself and not by the size of the entire estate.

As already indicated, it is apparent that the general application of the above principles or grounds of taxation must frequently result in double or treble taxation on the same bonds or stock. This has so far been recognized that some States (as Connecticut) retaliate where bonds and stocks of outside or foreign corporations owned by its citizens are taxed by the State of organization, by imposing a similar burden upon corporations of the offending State; and three States (New York, Massachusetts and Kansas) give credit for taxes paid in another State where such State reciprocates. As a rule, the taxing State takes into account only that proportion of the corporation's property which is actually within its jurisdiction.

Without adverting to the peculiarities of legislation in the fifty Commonwealths which make up the American Union, two wealthy States may be mentioned as representative, first, of unprogressive, and, secondly, of advanced ideas in relation to inheritance taxation. Illinois is an example of the less progres-

sive State. While its treatment of near relatives is not severe, its exemption in the case of non-relatives is only $500, and its rate of taxation is according to a scale increasing sharply with the amount taxed. Thus, the transfer is taxed three per cent. up to $10,000; four per cent. up to $20,000; five per cent. up to $50,000; six per cent. up to $100,000, and ten per cent. above $100,000. The State claims from non-residents a tax not only upon shares of corporations incorporated in Illinois, but also upon shares of corporations, no matter where incorporated, which may own property within that State; and also upon registered bonds, although held by non-residents. These rates were exceeded, however, by the State of Washington, which formerly assumed to tax all sums passing to collateral relatives or strangers of the blood, who are aliens not residing in the United States, twenty-five per cent. upon their inheritances. The Supreme Court of the State held this remarkable statute invalid. It is paralleled by the Quebec amendment of 1907 imposing an additional tax of five per cent. upon inheritances passing to non-residents; which was wisely repealed three years later.

On the other hand, Pennsylvania enjoys the distinction of having always possessed a moderate inheritance tax law. No tax whatever is imposed upon direct inheritances; nor does the State tax stock in Pennsylvania corporations where such stock is owned by the estate of a non-resident; nor does it tax securities for money which may be physically within the State at the time of the owner's death. The principle that personal property follows the domicile of the owner is wisely adhered to (Coleman's Estate, 151 Penna. 4). As a result of these moderate laws, some of the largest corporations in the country make their home in the State, and capital feels reasonably safe there. Fifteen States, among them Delaware, Maryland and Virginia, exempt direct inheritances. Massachusetts exempts bonds and certificates of stock of foreign corporations found within the State, and taxes non-resident decedents upon real estate within Massachusetts only.

Any attempt at a review of the specific provisions of the various State Statutes, must be necessarily brief and imperfect.

In New York the earliest statute (of 1885) did not apply to transfers of property made in the case of a non-resident: *Matter of Euston,* 113 N. Y. 174; *Matter of Dingman,* 66 App. Div. 228; but by the amendment of 1887, ch. 713, in effect June 25th, 1887, these estates were taxed. The Act of 1892, in effect May 1st, 1892, expressly imposed a tax upon the transfer of all property within the State belonging to a non-resident, and eliminated the former requirement that a non-resident should own real property within the State in order to supply a basis for the jurisdiction. Prior to 1909, the exemption on all transfers to non-relatives extended to $500; where this value was exceeded, the tax was 5 per cent. upon the whole amount. Up to the date of the last amendment, transfers to certain near relatives were exempt to the extent of $10,000; beyond that amount the tax was one per cent.

By a subsequent amendment (ch. 706, Laws of 1910) the exemption to non-relatives was reduced to $100; where the property exceeded that value, the tax was imposed at 5 per cent. as a "primary rate." The exemption upon transfers to near relatives was cut down to $500. If the amount exceeded $500, one per cent. was fixed as a "primary rate." The following exception was made: if a transfer of $5,000 or less was made to a father, mother, widow or minor child, the exemption then extended to that sum, and the further rates of tax were levied only upon the excess: the benefit of this exception, however, did not extend to a brother, sister, wife or widow of a son.

The above rates of tax imposed in New York by the Act of 1910 (known as the Hughes Act) were denominated by the Statute as "primary rates," and whenever the amount of property transferred in any of the foregoing cases exceeded $25,000 over and above the exemptions enumerated, the rate of taxation in all cases was as follows:

Upon all amounts in excess of the said $25,000 and up to and including the sum of $100,000, twice the primary rates: Upon

all amounts in excess of the said $100,000 and up to and including the sum of $500,000, three times the primary rates: Upon all amounts in excess of the said $500,000 and up to and including the sum of $1,000,000, four times the primary rates: Upon all amounts in excess of the said $1,000,000, five times the primary rates.

This short lived Statute had its value. It represented the unwise greed of the legislature, and exemplified all the worst features of tax legislation of this character. It overlooked the fact that domicile is always a matter of choice, and that wealth soon leaves a domicile where it is subjected to taxation which it deems excessive. The Statute was designed to increase the State's revenue, which, from inheritance taxes, then amounted to eight and one half million dollars. The loss in revenue the first year of its enactment was two million dollars. Four hundred million dollars of capital were forthwith withdrawn from investment in the State, and five thousand seven hundred safe deposit boxes were hurriedly emptied and surrendered. The New York Chamber of Commerce was moved to formally advocate the repeal of the obnoxious law. Other results were, that owners of large capital organized incorporations to act as holding companies. Cases were known where legatees formally renounced their legacies in order to escape the heavy tax, being subsequently compensated out of the estate.

So well recognized were the evils brought about by this unwise Statute, that in July, 1911, it was radically modified by the Harte Act (N. Y. Laws 1911, Ch. 732), which reduced the maximum rate of taxation from 25 per cent. to 8 per cent., and on direct bequests from 5 per cent. to 4 per cent.; and increased the exemptions five-fold. The new law exempted bequests to direct heirs and near relatives up to $5,000 and bequests to collaterals up to $1,000. The old rate of one per cent. to direct heirs and five per cent. to collateral relatives was restored, and was not increased unless the property exceeded $50,000; on any amount above that sum up to $250,000 the rates were two per

cent. and six per cent. respectively; on any amount above $250,000 and not exceeding $1,000,000 the rates were three per cent. and seven per cent. respectively; and on amounts above $1,000,000, four per cent. and eight per cent. respectively. The tax is imposed upon the amount of each bequest, and is not upon the entire estate.

More important even than this reduction in rates was the abolition of the double taxation of non-residents upon property formerly taxable both in New York State and in the State of the decedent's domicile. Thus, shares of stock in New York corporations, whatever the domicile, were formerly subject to taxation, but are now exempted, if taxed in the State of domicile; and the same applies in the case of non-residents to personal property in the shape of money, deposits in banks, shares of stock, bonds, notes, credits, evidences of debt, and other intangible securities which may at the date of the death of the non-resident be found physically within the State. This would apparently be now the only subject of double taxation; since in the case of a person domiciled in England movable property would seem to be subject to estate duty even if its situs was out of Great Britain. In Germany, however, the estate would be entitled to deduct the tax paid in the foreign jurisdiction of the situs. Lands will still, of course, be taxed; and so will such tangible personal property as household goods, wares, and merchandise located in the State. It is to the credit of the Legislature of this State that it has now adopted the honest policy of taxing only such property as has an actual situs in the State. This is in accordance with the recommendation of the 1910 Conference of the International Tax Association. The provision which aims to abrogate the evil of double taxation is modelled upon the Massachusetts Statute, which provides that taxes upon the stock of Massachusetts corporations owned by the estate of a non-resident upon which a tax has been paid in the State of domicile, will be reduced by the amount of such payment, provided that by the laws of the domicile a similar exemption is granted. An equivalent provision will be found in the Statutes of Connecticut, Michigan and Maine. In Vermont, where the

stock has been legally taxed in another State, only such tax will be imposed as will make the entire tax, both within and without Vermont, equal to five per cent.

A feature of interest is the frank avowal heard in many quarters that inheritance taxes may and should be employed to reduce "swollen" fortunes and to prevent their transmission beyond one generation. The National Assembly of France has more than once debated propositions to increase all inheritance taxes to accomplish this purpose, and to abolish all intestate inheritance except between very close relatives. The same subject was discussed not long ago by the Illinois Bar Association, a committee of which reported in favor of an amendment to the law of descent and distribution, limiting the amount which any person might take by inheritance or bequest, the balance to go to the State. It is plain that by imposing each higher rate of taxation only on the excess above the amount subject to the next lower rate, small or moderate estates would not be unduly diminished, while an absolute limit could be placed upon inheritances. Within the United States, constitutional guarantees requiring that direct taxes shall be apportioned and indirect taxes uniform would prevent the entire property of a citizen being taken from him by legislation; but, on his death, no such protection is afforded his estate. The tax is not imposed upon property, but upon the right of succession. Each State may concede or refuse to concede such a right. It may declare that the property of all decedents belongs to the State, or it may impose any terms for allowing the claims of next-of-kin, heir or devisee: it may legally confiscate as much of the estate as it desires. Such a state of affairs was considered by the Supreme Court some dozen years ago, and dealt with as follows:—

"The grave consequences which it is asserted must arise in the future, if the right to levy a progressive tax be recognized, involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise where an arbitrary and confiscatory exaction is imposed, bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and

fundamental principles for the protection of the individual, even though there be no express authority in the constitution to do so. (*Knowlton* v. *Moore*, 178 U.S. 41.)"

The natural right of an alien to inherit would be, if possible, still more precarious. The opinion in *Mager* v. *Grima, supra,* states:—

"Every State or nation may unquestionably refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee; and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day real property devised to an alien is liable to escheat."

At the same time, it is not in the United States that confiscatory legislation, under the guise of inheritance taxes, need be feared. While so-called leaders of the people have advocated the reduction or confiscation of "swollen fortunes," no move in the direction of such legislation has yet been made, or would be likely to find any support. The rates of inheritance taxation imposed generally throughout the United States compare favorably with the exactions of European countries.

Thus, in Great Britain, the Finance Act of 1894, as amended by the Act of 1907, imposed an "estate duty" of one per cent. upon estates between £100 and £500 in value, while large estates exceeding £750,000 paid from ten to fifteen per cent. Beyond £1,000,000, the assessment for estate duties is ten per cent. for the first million and eleven per cent. for the next half million; and increasing by one per cent. for each half million beyond the first million, the final rate is, for an estate exceeding three million pounds sterling, ten per cent. upon the first million and fifteen per cent. upon the balance. Nor were these the only taxes upon inheritance, since the Act also imposed a "legacy duty" upon personal property, and a "succession duty" on real estate passing to collateral heirs, graduated in accordance with the relationship of the decedent and the heir, and varying from three per cent. for brothers and sisters to ten per cent. for distant relatives and strangers in blood. These legacy and succession taxes apply nominally to direct heirs also, at the rate of one per cent.; but payment of estate duty appears to release

direct heirs from payment of legacy or succession duty. The exemptions are £100 in the case of estate duty, and £1,000 in the case of legacy or succession duty. To estimate somewhat roughly the severity of this taxation, it would seem that any portion of an estate exceeding £3,000,000 in value passing to a distant relative on intestacy, or by will to a stranger in blood, will pay the government about twenty-three per cent. Under similar circumstances, the same estate in France would be assessed over twenty per cent.; while in Germany, although direct descendants of the decedent are exempted from taxation, the rates are so sharply progressive that inheritances exceeding one million marks ($250,000) passing to distant relatives, are mulcted twenty-five per cent. No such severe taxation can be found within the United States, nor anything approaching it.

The New York State Conference on Taxation, held at Utica January 12th and 13th, 1911, after long debate, approved and adopted general principles of inheritance taxation.

These principles are to tax real estate and tangible personal property only in the State where they are situated; and to tax all tangible personalty only at the domicile of the decedent. The Conference favored, in the case of lineal descendants, moderate graded taxation with liberal exemptions; and smaller exemptions, with reasonably increased and graded rates, on all bequests to collaterals.

The New York Tax Reform Association subsequently approved these principles and added the further suggestion that the rate of taxation upon each bequest should be governed by the size of such bequest, and not by the amount of the whole estate.

In discussions upon the general subject of exemptions, it has been also suggested that considerations of public policy ought to exempt certain classes of property which are in no sense income-producing. Thus, collections of antique paintings, ancient tapestries, curios, relics and heirlooms; sculptures, ancient or modern; bronzes; collections of ancient coins and libraries form a species of property which it is not in the interest of the public to sub-

ject to an inheritance tax. Such tax offers a distinct discouragement to the collection or retention of art objects, which it is yet in the interest of the general culture and education of a community to have collected and preserved. It is readily seen that collections of this nature are not usually made with any view of profit, since their value is extremely variable and uncertain; but a more substantial reason exists in the occasional high values placed upon such curios, coupled with the difficulty of finding an immediate purchaser. Thus, the devisee of valuable heirlooms, such as ancestral portraits by old masters must often, at present, either sell the bequest to raise the money necessary to pay the inheritance tax upon it or forego the bequest.

The model Inheritance Tax Law, adopted by the National Tax Association, at their Annual Conference in Milwaukee, 1910, contained a clause exempting libraries, paintings, curios, relics and similar bequests where bequeathed to educational or scientific institutions. But this does not go far enough. The public value of collections of art objects has been recently recognized in the action of Congress in removing all import duties on works of art more than twenty years old.

On the other hand, a prominent banker recently removed a valuable collection of paintings, antiques and curios from the National Gallery and elsewhere in London to New York upon the ground that the estate duty imposed by the British Law was much more excessive than that imposed by the State of New York. Even in the latter State, until this recommended amendment of the law is made, collectors of art objects must bequeath them to public institutions if they wish to escape burdening their next of kin with impositions so heavy as to compel a sale of the bequest to meet them. It is clear that no duty should be levied upon art objects or upon articles which have merely an educational value. The entire community benefits in the preservation of such objects and their collection should be everywhere distinctly encouraged.

New York. W. SETON GORDON.

THE BANISHMENT OF THE RICH.

It used to be said that the Vice-President of the United States was of necessity an inconspicuous personage whose duties consisted in presiding over the Senate and nothing more, unless in the few cases when he was called upon to fill the presidential chair by reason of the rare but still all too frequent removal of the President by assassination. The Democratic Vice-President, Thomas R. Marshall, however, within the few weeks since his inauguration, has contrived to draw the attention of the country to him by his recently published views upon the duties, dangers and probable fate of rich men resident in the Republic.

Mr. Roosevelt, during his seven years as President, did, it is true, say many bitter things concerning rich men, or "malefactors of great wealth," as he was fond of calling them; and on more than one occasion, he frankly advocated reducing their "swollen fortunes" (another of his happy expressions which has passed into history) by various forms of financial bloodletting through cunningly devised taxation. The country at large, however, suspecting that he was himself not averse to accepting financial assistance for party purposes from the classes he denounced, was disposed to look upon his threats as mere rhetorical mouthings; and it is certain that he personally, while in office, made no move to give them practical effect.

Vice-President Marshall, in a speech delivered at the National Democratic Club in New York on April 12th, declared that there exists a feeling throughout the masses of voters in the United States that such immense fortunes as have been accumulated since the Civil War constitute a menace to the country, and that the people would yet discover a means to reduce these fortunes by taxation, unless rich men mended their ways.

Some few days later, in Washington, he repeated his warnings and again stated that "the right to inherit and the right to devise are neither inherent nor constitutional (i.e., necessarily protected by the Constitution) but on the contrary, they are simply privileges given by the state to its citizens": and he pro-

ceeded, "men of judgment have expressed to me the opinion that were a vote to be taken on the proposition that all estates over $100,000 revert to the state upon the death of the owner—the $100,000 being exempt—it would be carried two to one."

There is no doubt that it would. And herein lies the danger of the position, not alone to men of wealth, but to the entire community. Laws relating to Wills and Intestacy are within the legislative power of the individual states; and any state Legislature may repeal its Wills Act, as well as abolish or alter legislative provisions for the devolution of estates upon intestacy. Both the Federal Government and individual state Governments may increase Inheritance Taxes to an extent which would practically confiscate all large fortunes; there is no constitutional impediment. But is it to the public interest to do so?

It is undeniably true that there exists among large masses of the people profound dissatisfaction with the existing distribution of wealth in the Republic. That "no man can in a lifetime honestly accumulate a million dollars" expresses a belief generally held; and in the public mind the corollary follows that all estates greater than this have been dishonestly acquired. "The Trusts" and "Wall Street" are all thieves together: such is the belief of the majority of voters.

It must not be overlooked that we are dealing not with facts that actually exist; but with what the mass of voters, rightly or wrongly, believe. It is their belief, possibly consciously or unconsciously coloured by a selfish wish to possess themselves of the accumulated wealth of others, that tells at the ballot-box.

The Federal Income Tax is said to be drawn so as to exempt all incomes under $5,000 per annum; and it is estimated that there are only 400,000 people in the United States who will be unable to escape taxation under it. Of course it is popular; since this small number are to be taxed for the benefit of the many. Such a law, if submitted generally to the voters of the country, would be sure to be carried not only two to one, but one hundred to one.

The man on the street has not the education, training or time to deal with questions of this magnitude, and will be generally found to acquire his opinions from the public press. It is a cheering fact that the press of the United States, taken as a whole, is conducted by men of signal ability. It represents the brains, conservatism and judgment of the people at large; and on this important question it has not yet spoken. The men who write for the press are fully alive to the fact that great accumulations of capital are essential to the successful conduct of the gigantic business operations of modern times; that the day of the small manufacturer has passed, never to return; and that the contemplated reduction of the United States tariff, which will bring the American manufacturer, for the first time in fifty years, face to face with the great manufacturers of the world, and will open American markets to the competition of their powerful rivals in England and Germany, renders it more than ever necessary that great accumulations of money should still remain largely in individual hands. The capitalist, the captain of industry, the mill-owner, the money king, may have his faults, but the wage-earner cannot yet, it would seem, subsist without his aid. To drive him out of the country by threats of robbing him of his wealth would leave the country in a sorry plight.

Such hasty action need hardly be apprehended, notwithstanding the grave warning of a man high in political office who knows the American people well, and whose views of their sentiments and purpose are entitled to the deepest respect. To accept it literally would be to suspect a great, free and just people of harbouring an unjust design to drive from its shores its most successful and valuable citizens for no crime other than their success. The revocation of the Edict of Nantes drove to England in thousands the Huguenot hand-workers whose skill in their various crafts established her primacy as a manufacturing nation. No modern State will commit a similar blunder.

STATUTE OF LIMITATIONS AND MORTGAGES.

The case of *Noble* v. *Noble,* 27 O.L.R. 342, can hardly be said to have been satisfactorily disposed of. It was tried by Mulock, C.J.E., who gave judgment for the defendants, which was reversed by a Divisional Court, (Boyd, C., Riddell, and Sutherland, JJ.), whose judgment has in turn been reversed by a majority of the Court of Appeal (Garrow, Maclaren, and Magee, JJ.A., Meredith, J.A., dissenting). There are thus an equal number of Judges in favor of each party to the litigation, but those who speak last prevail. There appeared to be practically no dispute as to the facts, and the case was narrowed down eventually to a bare question of law which may be shortly stated thus: A being owner of the land in question subject to an outstanding mortgage let B into possession as tenant at will. B acquired a title by possession as against A but not as against the mortgagee, whose mortgage was kept alive by payments from A. A, after B had acquired title by possession against him as regards the equity of redemption, paid off the mortgage and took and registered a certificate of discharge. In these circumstances is A entitled to recover possession from B, the mortgage being overdue? The Court of Appeal have decided that he is not, and the court declined to decide whether or not A on the principle of *Brown* v. *McLean,* 18 Ont. 533, is entitled to a lien in respect of the money paid by him on the mortgage. With all due respect to the Court of Appeal we do not think that this can be reasonably said to be a preventing of multiplicity of suits within the meaning of the Judicature Act. All necessary parties were before the court for determining their rights in the matters in question, and after a lengthy litigation they are told by the court that in order to settle their rights it will be necessary for them to begin another litigation, as far as we are able to see, without any substantial reason. Even under the old Comman Law Procedure Act judges were accustomed to say "never mind the pleadings, let us have the facts and we can then make the pleadings suit them." Here, all the facts were before the court, but after an expensive litigation the rights of the parties

in the matter in controversy are virtually left undetermined. We think that such a state of things is hard to justify, and it is disappointing to find that it is still possible to exist under our supposed improved methods of procedure.

If the disposition of the case be unsatisfactory in this view, it appears to us equally so in regard to the point actually decided—in that it appears to fail to give due effect to the legal right of the mortgagee which was admittedly unaffected by the Statute of Limitations. The operation of a certificate of discharge of a mortgage is, according to the Registry Act, to be that of a conveyance of the estate. If the mortgagee had conveyed the land to a stranger the latter would have had, beyond question, the legal title to the land, and the mortgage being in default, he would have had the legal right to possession. If a stranger should unwarily take a discharge of the mortgage which he pays off instead of a conveyance from the mortgagee he is not to be presumed to have cleared the estate of an incumbrance for the benefit of some one else, but as was decided in *Brown* v. *McLean*, 18 Ont. 533; *Abell* v. *Morrison*, 19 Ont. 669, he is equitably entitled to treat the mortgage as a subsisting incumbrance, and to be subrogated to the rights of the mortgagee.

When the mortgagor in *Noble* v. *Noble* was barred of his equity of redemption under the Statute of Limitations, he had at all events the same rights as any other stranger to the estate, and when he paid off the mortgage debt he was, though barred as mortgagor of his equity of redemption, nevertheless entitled to step into the shoes of the mortgagee, and for the Court to treat his payment of the mortgage as merely having the effect of the removal of an incumbrance, is not, we think, giving due effect to the Registry Act. If it be true that a stranger paying off a mortgage is not entitled to the rights of the mortgagee as held in *Noble* v. *Noble*, then it seems to us the rights of the mortgagee are impaired, and he cannot sell or assign his security so as to give his vendee or assignee his title, and though the Statute of Limitations purports to protect his title, it is, by the decision in *Noble* v. *Noble*, found really not to do so. The tak-

ing of a certificate of discharge in lieu of a conveyance is confessedly a matter of no importance as regards the substantial rights of the parties: *Brown* v. *McLean; Abell* v. *Morrison, supra,* and yet in the case of *Noble* v. *Noble* it is made the ground for depriving a party of his rights.

The decision of the Court of Appeal appears to us to run counter to prior decisions and the true meaning of both the Statute of Limitations and the Registry Act.

As we understand the cases, there is a wide difference between the rights of a mortgagee who acquires his mortgage before any adverse possession has begun against his mortgagor; and one who acquires his mortgage after an adverse possession has begun against his mortgagor. In the former case the rights of a mortgagee are saved by the Statute of Limitations for ten years after the last payment received under his mortgage from a person entitled and liable to pay. But where an adverse possession as against the mortgagor had begun at the time a mortgage is made, then, the Statute of Limitations having begun to run, it is not stopped by the giving of a mortgage, nor is a new starting point thereby created, but the mortgagee is in no better position than any other alienee of the mortgagor would be. That we take to be the result of *Thornton* v. *France* (1897), 2 Q.B. 143, and *McVity* v. *Trenouth,* 9 O.L.R. 105, 36 S.C.R. 455, although it is true this last case was ultimately reversed (1908) A.C. 60, as in the opinion of the Judicial Committee of the Privy Council, the Statute of Limitations did not begin to run, owing to the peculiar circumstances of that case, until the giving of the mortgage.

In *Noble* v. *Noble* the plaintiff purchased the land in question in February, 1895, and on the same day gave the mortgage for part of the purchase money. The defendant's predecessor in title (a son of the mortgagor) was let into possession as tenant at will in April, 1895, and in April, 1896, the statute began to run as against the mortgagor, but not as against the mortgagee. In 1906 the mortgagor's title as against his son and

those claiming under him was barred by the Statute of Limitations, but the mortgage being duly kept alive by payments on account, was paid off by the mortgagor in 1908, and a certificate of discharge was then given, and registered in 1911. Though the defendant had acquired a title against the owner of the equity of redemption, he had not acquired a title as against the mortgagee. This is conceded by all the members of the court.

The true legal position of the matter would therefore appear to be this, the defendant had acquired or extinguished the mortgagor's right of redemption by virtue of his possession as against the mortgagor, which would possibly entitle him to redeem and thus acquire an absolute estate. But the mortgagor who had thus lost his right of redemption nevertheless paid off the mortgage, he was therefore in the position of a stranger paying off an incumbrance in such circumstances as would entitle him notwithstanding he accepted a discharge of the mortgage, nevertheless to claim that it was a subsisting incumbrance: *Brown* v. *McLean*, supra. The mortgagor had then in effect ceased to be mortgagor, and had, in fact, become the mortgagee with all the rights incident to that position, and the mortgage being in default he was entitled to recover possession, but that right to possession would be as mortgagee and should not be held to oust the right of the defendant to redeem by virtue of his possessory title as against the mortgagor qua mortgagor. It is only by working the matter out in this way that we think that due effect can be given to all the provisions of the Statute of Limitations in favour of mortgagees and adverse occupants.

GRAY V. WILLCOCKS.

By the Hon. Mr. Justice Riddell, L.H.D., LL.D

In the account of the case, *Gray* v. *Willcocks*, in the January number of this journal (49 C.L.J. 28) it was not noted that it was the first case in which the decision of the judges of the Court of King's Bench in Upper Canada was reported in the press.

In the issue of *The Oracle*, published at York (Toronto), January 18, 1806, being No. 39 of Volume XV. (total number 767) is found the following:

"The judges of the Court of King's Bench gave their opinion last Monday on the question mooted in the preceding term: Whether lands and tenements holden in free and common soccage could for the payment of debts be sold under an execution of the court.

Mr. Justice Powell being of opinion that the writ ought to issue, and Mr. Thorpe against it, the plaintiff took nothing by his motion. We understand that an appeal is intended to the King and Council. As the question excited much anxiety, as well in the landed as in the commercial interest, a number of the most respectable persons in the town and its vicinity attended to hear the judgment of the court, and Mr. Justice Thorpe, on delivering his sentiments entered into the consideration of Soccage Tenures, and the exposition of the statutes in a manner which afforded the highest gratification to every admirer of the English language and law.

Mr. Attorney-General and Mr. Solicitor-General were counsel for the writs issuing for the sale of lands. Mr. Weekes and Mr. Stewart against it. We understand that the case will be reported by a Gentleman of the Bar."

The case in the Judicial Committee has never been reported, and I owe the report to the Registrar of the Privy Council. It is subjoined:

"At The Council Chamber, Whitehall.

The 9th of February, 1809.

By The Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations.

Present: Master of the Rolls, Sir William Scott, Sir Evan Nepean, Bart., Mr. Dundas.*

Committee report on the appeal of John Gray, Esq., against William Willcocks, Esq.

YOUR MAJESTY having been pleased by Your Order in Council of the 16th November last to refer unto this Committee the humble Petition and Appeal of John Gray, Esquire, of Upper Canada, against William Willcocks, Esquire, setting forth, that the said William Willcocks being indebted to the Appellant in the sum of £500, he on or about the 26th day of September, 1800, entered into a bond to the Appellant in the penal sum of £1,000 conditioned for the payment of £500 and interest at the time and in the manner therein mentioned and at the same time he executed a Warrant of Attorney authorizing certain Attornies

*The Master of the Rolls was Sir William Grant, a Scotsman, educated at Aberdeen. Born in 1752, he was called to the Bar at Lincoln's Inn in 1774; next year he emigrated to Quebec, where he commanded a body of volunteers during the siege by Arnold and Montgomery. He was created Attorney-General of Canada in 1776, but returned to England in 1779. There he became somewhat prominent in Parliament: he was appointed Solicitor-General and knighted in 1799, member of the Privy Council and Master of the Rolls in 1801. This office he continued to fill till 1817, when he resigned, dying in 1832. Powell tells us that it was his belief, that Grant's return to England made an opportunity for a lawyer in Quebec that induced him (Powell) to come to Canada in 1779, although he had not yet been called to the Bar.

Sir William Scott, afterwards Lord Stowell, was an elder brother of Lord Elden. Born in 1745, he became an advocate at Doctor's Commons in 1779, and was called to the Bar the following year; he was knighted and created King's Advocate-General in 1788, and in 1798 made Judge of the Admiralty, and sworn of the Privy Council. In 1821, he was created a Peer; resigning his judgeship in 1828, he survived till 1836.

Sir Evan Nepean, was the well-known Secretary of the Admiralty, "a hard-working official." Born in 1751, he became successively a clerk in the navy, a purser, secretary to an Admiral, and Under-Secretary of State, Commissioner of the Privy Seal, Under-Secretary of War and Secretary of the Admiralty. Created a Baronet in 1802, he became Chief Secretary for Ireland in 1804, and the same year a Lord of the Admiralty. At the time of this judgment, he does not seem to have held any office of emolument.

Mr. Dundas was not the first Viscount Melville, Henry Dundas, the well-known friend of Pitt, but his only son, who became the second Viscount Melville. Born in 1771, he became a member of the Ministry formed by the Duke of Portland, and was sworn of the Privy Council in 1807. He continued in active political life, much of the time in office, till 1830, and died in 1851.

therein named to enter up judgment against him on the said bond; That in Hilary Term in the 44th year of Your Majesty's reign judgment was entered up and docqueted against the said William Willcocks in Your Majesty's Court of King's Bench for the Province of Upper Canada, and a writ of Fieri Facias having issued thereon in Easter Term following the Sheriff returned nulla bona to such writ: That in the same Easter Term the Appellant apprehending himself to be intituled by virtue of the Act of the 5 of His late Majesty, Geo. 2, ch. 7, whereby houses, lands, negroes and other hereditaments and real estate situate within the British plantations in America belonging to any person indebted are made liable to and chargeable with all just debts and demands whatsoever owing by any person to His Majesty or of any of His Majesty's subjects, to have a writ of execution against the lands and tenements of the said William Willcocks, applied to the said Court of King's Bench for a Rule to shew cause why such writ should not issue, which Rule was accordingly granted by the court, but the same was upon argument afterwards discharged; That the Appellant having appealed to the Court of Appeals of the said Province from the said Order of the said Court of King's Bench refusing to award the said writ of execution against the lands and tenements of the said William Willcocks, the same came on to be heard before the said Court on the 13th day of April last when that court was pleased to affirm the judgment of the Court of King's Bench, from which judgment of the Court of Appeals the Appellant prayed leave to appeal to Your Majesty in Council, which was granted to him on the usual terms, and the Appellant humbly prays that the said judgment may be reversed or for other relief in the premises; the Lords of the Committee in obedience to Your Majesty's said Order of Reference this day took the said Petition and Appeal into consideration, and having heard Counsel on both sides thereupon, their Lordships do agree humbly to report as their opinion to Your Majesty that the judgment of the Court of King's Bench for the said Province entered up in Hilary Term in the 44th year of Your Majesty's reign and also the judgment of the Court of Appeals of the said Province of the 13th of April last, should be reversed and that the cause should be remitted back to the said Court of King's Bench in Upper Canada in order that a writ of execution may be awarded to the Appellants against the lands and tenements of the Respondent."

The order of the King in Council, appears from the following report:—

"AT THE COURT AT THE QUEEN'S PALACE.

The 15th of February, 1809.

Present: The King's Most Excellent Majesty,† Lord Chancellor, Lord Chamberlain, Lord President, Lord Privy Seal, Duke of Montrose, Lord Steward, Earl of Liverpool, Lord Mulgrave, Viscount Castlereagh, Mr. Secretary Canning.

WHEREAS there was this day read at the Board a Report from the Right Honourable the Lords of the Committee of Council for hearing Appeals from the Plantations, etc., dated the 9th of this Instant in the Words following, viz.:

[Report of Committee copied and inserted.]

HIS MAJESTY having taken the said report into consideration, was pleased by and with the advice of His Privy Council to approve thereof, and to order, as it is hereby ordered, that the same be duly and punctually complied with, and carried into execution; Whereof the Governor or Lieutenant-Governor of the Province of Upper Canada for the time being, and all others whom it may concern, are to take notice and govern themselves accordingly."

Mr. Justice Thorpe was persona grata with the Radical party; and was, not long after, cashiered by the Lieutenant-Governor, Francis Gore, by the direction of the Colonial Secretary. This was in November, 1807. Mr. Justice Powell subsequently became Chief Justice of Upper Canada, and survived until 1831.

WILLIAM RENWICK RIDDELL.

†The Lord Chancellor at the time was Lord Eldon; Viscount Castlereagh was the noted Castlereagh so much cursed by patriotic Irishmen. Mr. Secretary Canning was the Canning. He was at the time Foreign Secretary, but was not wholly satisfied with the policy of the government. The trouble became acute later on in 1809. Canning fought a duel with Castlereagh and resigned September, 1809.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

COMPANY—MEETING—POLL—PROXIES TO BE LODGED 48 HOURS BEFORE MEETING "OR ADJOURNED MEETING"—POLL FIXED FOR FUTURE DAY—NO ADJOURNMENT OF MEETING.

Shaw v. *Taiti* (1913) 1 Ch. 292. At a general meeting of a company a poll was appointed to be held at a future day, but no adjournment of the meeting to that time took place. By the articles proxies might be lodged 48 hours before a meeting or "adjourned meeting." The question in the case was whether proxies lodged in the interim 48 hours before the poll were valid. Eady, J., held they were not and that the mere postponement of the poll was not an adjournment ad hoc of the meeting, within the meaning of the articles, but that the original meeting continued for the purpose of the poll and no fresh proxies could be lodged in the interval.

FORFEITURE—WILL—CONSTRUCTION—DETERMINABLE LIFE INTEREST—RECEIVING ORDER—DISCHARGE OF RECEIVING ORDER.

In re Laye, Turnbull v. *Laye* (1913) 1 Ch. 298. The question in this case was whether or not a forfeiture had taken place. By a will property was given in trust for a son of the testator "until he should die or have his affairs liquidated by arrangement or composition" or do or suffer anything whereby the income, or part thereof, would, if belonging absolutely to him, "become payable to some other person." A receiving order in bankruptcy was made against the son 9th December, 1910, but his creditors having accepted a scheme for payment of their debts in full on 24th February, 1911, the receiving order was discharged.—The trustees alleging that on 3rd January, 1911, income had become due, applied to the court to determine whether in the circumstances a forfeiture had taken place, and Eve, J., decided that if income had in fact become payable while the receiving order was in force, a forfeiture had taken place; but he did not decide whether if no income had become payable while the receiving order was in force, the same result would follow. An inquiry was therefore directed, if desired.

SETTLEMENT BY WILL—CONSTRUCTION—TRUST BY REFERENCE—SEVERAL TRUST FUNDS—HOTCHPOT CLAUSE.

In re Wood, Wodehouse v. *Wood* (1913) 1 Ch. 303. The facts in this case were that a testator had by his will given three separate trust funds for his three children respectively for life, with remainder to their respective issue as they should respectively appoint, and in default of appointment to their respective children in equal shares with a hotchpot clause; and in each case he gave the fund over on failure of the express trusts to his other children and their issue successively by reference to the trusts expressly declared in favour of such children and their issue concerning the fund given in trust for them in the first instance. In the events which happened a grandchild of the testator became entitled to one fund by appointment, and to a share in another fund in default of appointment; and Neville, J., held that she was entitled to take her share in the unappointed fund without bringing into hotchpot the appointed fund; and he held that there is no general rule of construction that where a fund is settled subject to a hotchpot clause, and by the same instrument a second fund is settled by reference to the trusts of the first, that there is any implied intention to make the hotchpot clause applicable to both funds; but in every case it is a question of construction upon the whole instrument.

CHARITY—GIFT FOR SCHOOL—FAILURE OF PARTICULAR OBJECT—CY-PRÈS.

In re Wilson Twentyman v. *Simpson* (1913) 1 Ch. 314. The facts in this case were as follows: A testator gave personal property "the interest to be given to a schoolmaster as part of his salary. The school and his house to be erected by voluntary subscriptions from the landowners and proprietors of the parish of Aikton, and the school and house to be placed on a hill near to the gate that divided Biglands and Wampool Commons . . . The master to teach five days in a week and six hours each day, Saturday and Sunday excepted; to be able to instruct the pupils in Latin and Greek, and all the elementary parts of mathematics, both pure and mixed; the Wampool scholars to go free, the rest to pay 2s. 6d. each at midsummer and Christmas as quarter pence." No school had, in fact, been established as the testator anticipated, and there was evidence that there was no prospect of any such school ever being established at or in

the neighbourhood where the testator contemplated it being built. In these circumstances Parker, J., held that the trust had failed as no general charitable intention could be inferred, and the particular object intended could not be carried out. He, however, gave the Attorney-General a limited time to decide whether or not he would take an inquiry whether, and how far, the directions of the will could be carried out.

SETTLEMENT—POWER TO APPOINT MONEY—WILL—TRUSTS OF WILL DECLARED BY REFERENCE TO TRUSTS OF SETTLEMENT—COVENANT TO SETTLE AFTER ACQUIRED PROPERTY.

In re Beaumont Bradshaw v. *Packer* (1913) 1 Ch. 325. In this case the effect of a trust by reference was also in question. By a settlement made on the marriage of Mabel Packer she was empowered to appoint that the trustees of the settlement should raise out of the settled funds any sums not exceeding £2,000 to be paid to her for her separate use. The settlement contained a covenant by her to settle after acquired property of the value of £200 or upwards. The father of Mrs. Packer, who died in her lifetime, gave her a fourth of his residue and directed his trustees to hold her share upon the same trusts and with and subject to the same powers, including the powers of investment "as are in her marriage settlement contained in respect to the funds thereby settled." In these circumstances Farwell, L.J., held that Mrs. Packer was entitled to appoint £2,000 to be raised out of her share of the residue, but that the £2,000 would be subject to the covenant to settle after acquired property.

INFANT—MAINTENANCE—MAINTENANCE CLAUSE CEASING ON MARRIAGE—INTERVAL BETWEEN MARRIAGE AND TWENTY-ONE—INCOME ON PROSPECTIVE SHARE ACCRUING BEFORE MARRIAGE.

In re Cooper Cooper v. *Cooper* (1913) 1 Ch. 350. In this case a lady was entitled to a share under her father's will, the trustees being directed to hold it and the accumulations during her minority and then to pay the income to her for life, and after her death to hold the capital for her issue. There was a provision authorising maintenance out of income of share during minority or until marriage. She married before attaining twenty-one. Between the date of her marriage and attaining twenty-one income accrued and the question was whether the

trustees were bound to accumulate that interest and add it to the capital or whether they might apply it to the maintenance of the lady during the interval between her marriage and her attaining her majority. Farwell, L.J., held that they might, and that the maintenance clause did not shew a "contrary intention" so as to exclude s. 43 of the Conveyancing Act, 1881.

ADMINISTRATION — CREDITORS' ACTION — REPRESENTATIVES OF DECEASED EXECUTOR—TRUSTEE—DEVASTAVIT—PAYMENTS TO BENEFICIARIES SIX YEARS BEFORE ACTION—STATUTE OF LIMITATIONS—TRUSTEE ACT, 1888, (51-52 VICT., C. 59) S. 1 (3); S. 8—(10 EDW. 7, C. 34, S. 47 ONT.).

In re Blow, Governors of Bartholomew's Hospital v. *Camden* (1913) 1 Ch. 358. This case serves to deal a somewhat unexpected blow to the rights of trustees to plead the Statute of Limitations. The action was by creditors for the administration of the estate of a deceased person, the defendants being the surviving executor and the representatives of a deceased executor, and the beneficiaries to whom the estate had been distributed; the plaintiffs claiming as lessors. The estate of the deceased had been distributed among the beneficiaries more than six years before action without any provision being made to meet future liabilities under the lease except that the executors took a covenant from the beneficiaries to indemnify them against claims under the lease. The executors pleaded the Statute of Limitations, 51-52 Vict., c. 59 (see 10 Edw. VII., c. 34, s. 47 (Ont.)). Warrington, J., who tried the action, held that the Trustee Limitation Act did not apply (1) because the action was not one to recover money, (2) that if it were, the claim sought to be recovered was not one to which "no existing Statute of Limitation" applied.—With all due deference to the learned judge, it appears to us he has taken too narrow a view of the Act, and that the reasons he has assigned are inconclusive, and for our part we prefer the view expressed by Moulton, L.J., in *Lacons* v. *Woomall* (1907) 2 K.B. 350, 364, from which the learned judge dissents.

TRADE UNION—EXPULSION OF MEMBER—TRADE UNION ACT, 1871, (34-35 VICT. C. 31) SS. 4, 6, 13—(R.S.C. C. 125, S. 4)—TRADE DISPUTES ACT, 1906 (6 EDW. VII. C. 47) S. 4—PARTIES.

Parr v. *Lancashire & Cheshire Miners' Federation* (1913) 1 Ch. 366. The committee of a trade union passed a resolution to

expel the plaintiff, one of its members, from the union; and the present action was brought against the union and its president, vice-president, treasurer and secretary to restrain the union and its officers from wrongfully expelling him from the union. —The defendants pleaded that the act complained of was a tortious act done in furtherance of a trade dispute and therefore not actionable under the Trade Disputes Act, 1906, s. 4, but Neville, J., held that the Trade Disputes Act, 1906, did not apply to the case of a plaintiff suing in respect of a breach of his contractual rights. The plaintiff also sought to restrain the defendants from applying the funds of the union to illegal purposes. The officials claimed that they did not represent the association and that the Executive Committee and the trustees should have been made defendants; but Neville, J., held that the officials made defendants sufficiently represented the association for the purposes of the action. We may remark that there is always a difficulty in suing such organizations owing to the fact that they are not corporations.

WILL—CONSTRUCTION—REMAINDER "TO MY NEAREST MALE HEIR" —"MY NEAREST AND ELDEST MALE RELATIVE"—NO MALE HEIR—HEIRESS AT LAW—INTESTACY.

In re Watkins Maybery v. *Lightfoot* (1913) 1 Ch. 376. This was an appeal from the decision of Joyce, J. (1912) 2 Ch. 430 (noted ante vol. 48, p. 693) in which the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Hamilton, L.JJ.) have affirmed the judgment of Joyce, J., but not on the ground relied on by him, but entirely on the construction which they placed on the will, the particulars of which the reporter considers it unnecessary to record.

INFANT—CONTRACT—"NECESSARIES"—EDUCATION AND INSTRUCTION—EXECUTING CONTRACT—PART PERFORMANCE.

In *Roberts v. Gray* (1913) 1 K.B. 520, the plaintiff is the celebrated billiard player, and the action was to enforce a contract made with the defendant, an infant of nineteen, whereby it was agreed that the defendant and his father should accompany the plaintiff on a tour of the world for eighteen months and give exhibitions of billiard playing, the plaintiff to pay all expenses, and all receipts, prizes and testimonials received by either party on the tour to be equally divided between the plain-

tiff and defendant. The plaintiff, with a view to carrying out his part of the contract, expended much time and trouble and incurred liabilities in making arrangements for billiard matches. Disputes having arisen as to the kind of balls to be used the defendant repudiated the contract. The action was tried by Lord Alverstone, C.J., who gave judgment for the plaintiff for £1,500; and the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Hamilton, L.JJ.) affirmed his decision. The Court of Appeal being of the opinion that the contract, having regard to the position of the parties, was a contract for necessaries.—Education in the art of billiard playing as a means of earning a living, coming, as the court held, within the definition of necessaries for which an infant can make a binding contract.

SALE OF GOODS—C.I.F. CONTRACT—NONINSURANCE OF GOODS—SAFE ARRIVAL OF GOODS AT DESTINATION—DELIVERY—BREACH OF CONTRACT.

Orient Co. v. *Brekke* (1913) 1 K.B. 531. The plaintiffs contracted with the defendants for the sale of a quantity of walnuts at a price to cover cost, insurance and freight. The goods were sent from Bordeaux and arrived safely at their destination in England; the plaintiffs had, however, omitted to insure them, as required by the contract. The defendants refused to accept them on the ground that they had not been insured. The case was tried in the Mayor's Court and judgment given in favour of the plaintiffs, but the Divisional Court (Lush, and Rowlatt, JJ.) held that, by reason of the omission to insure, there had been no delivery in accordance with the contract, and therefore the plaintiffs were not entitled to recover.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

B.C.] IN RE BRITISH COLUMBIA FISHERIES. [Feb. 18.

Railway belt, British Columbia—Tidal Waters—Rights of Province and Dominion—Jurisdiction—Fish as feræ naturæ.

Held, 1. In respect of waters within the "Railway Belt" of British Columbia, which are tidal, it is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, by way of lease, license or otherwise, the exclusive right of taking fish which, as feræ naturæ, are the property of nobody until caught. The public right to take such fish being subject to the exclusive control of the Dominion Parliament, it is immaterial whether the bedts of tidal waters passed or did not pass to the Dominion in virtue of the transfer of the "Railway Belt."

2. As to waters within the "Railway Belt which, although non-tidal, are in fact navigable, the Legislature of British Columbia is likewise incompetent to make such grants.

3. It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, in the open sea within a marine league of the coast of that province, by way of lease, license or otherwise, the exclusive right of taking such fish (feræ naturæ).

4. In so far as concerns the authority of the Legislature of British Columbia to authorize the government of the province to grant, by way of lease, license or otherwise, the exclusive right to take such fish (feræ naturæ), in tidal waters, there is no difference between the open sea within a marine league of the coast of the province and the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province or lying between the province and the United States of America.

5. Per FITZPATRICK, C.J. and DAVIES, IDINGTON, DUFF and BRODEUR, JJ. (ANGLIN, J., expressing no opinion on the point): —The beneficial ownership of the beds of navigable non-tidal waters within the "Railway Belt" in British Columbia, which

were vested in the Crown in the right of that province, at the time of the transfer of the "Railway Belt lands" to the Dominion of Canada, passed to the Dominion in virtue of the transfer.

Atwater, K.C., and *Newcombe*, K.C., for the Attorney-General of Canada. *Lafleur*, K.C. and *H. A. Maclean*, K.C., for the Attorney-General of British Columbia. *Wallace Nesbitt*, K.C., *Aimé Geoffrion*, K.C., *E. Bayly*, K.C., and *C. C. Robinson*, for the Attorneys-General of Ontario, New Brunswick and Manitoba. *S. B. Woods*, K.C., for the Attorneys-General of Saskatchewan and Alberta.

Que.] CITY OF MONTREAL v. LAYTON. [Feb. 18.

Construction of statute—Quebec Public Health Act—R.S.Q. 1909, art. 3913—Inspection of food—Duty of Health officers —Quality of food—Condemnation—Seizure—Notice—Effect of action by health officers—Controlling power of courts— Evidence—Injunction—Appeal—Jurisdiction—Question in controversy.

Held, 1. Per FITZPATRICK, C.J.:—In the province of Quebec, in order to constitute a valid seizure of movable property there must be something done by competent authority which has the effect of dispossessing the person proceeded against of the property; notice thereof must be given; an inventory made and a guardian appointed. Where these formalities have not been observed, there can be no valid seizure: *Brook* v. *Booker*, 41 Can. S.C.R. 331, referred to.

2. Per FITZPATRICK, C.J.:—Extaordinary powers, conferred by stature, authorizing interference with private property must be exercised in such a manner that the rights of the owners may not be disregarded: *Bonanza Creek Hydraulic Concession* v. *The King*, 40 Can. S.C.R. 281, and *Riopel* v. *City of Montreal*, 44 Can. S.C.R. 579, referred to.

3. Per FITZPATRICK, C.J., and DAVIES and IDINGTON, JJ.:— The authority conferred upon health officers by the Quebec Public Health Act, respecting the condemnation, seizure and disposal of food, as being deleterious to the public health, is not final and conclusive in its effect, but it is to be exercised subject to the superintending power, orders and control of the Superior Court and the judges thereof.

4. Per ANGLIN and BRODEUR, JJ.:—The protection afforded by the provisions of the Quebec Public Health Act, cannot be invoked in favour of proceedings taken by a food inspector who has acted without exercising his independent judgment in regard to the condemnation of food as deleterious to the public health, but merely for the purpose of carrying out instructions received by him from municipal officials.

In the result, the finding of the trial judge, that the food in question was fit for human consumption (Q.R. 39, S.C. 520), being supported by evidence, was not disturbed, and the effect of the judgment appealed from (1 D.L.R. 160), was affirmed with a variation of the order making absolute the injunction against the defendant interfering therewith.

Appeal dismissed with costs.

Atwater, K.C., and *Aimé Geoffrion*, K.C., for appellant. *Dale-Harris*, for respondents.

Alta.] CROSS v. CARSTAIRS. [Feb. 21.

Appeal—Jurisdiction — Provincial election — Alberta Controverted Elections Act—Preliminary objections—Judicial proceeding—Final judgment.

Held, 1. Per DAVIES, IDINGTON and ANGLIN, JJ., that under the provisions of the Alberta Controverted Elections Act, the judgment of the Supreme Court of the province in proceedings to set aside an election to the Legislature is final and no appeal lies therefrom to the Supreme Court of Canada.

2. Per DUFF, J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the contemplation of section 2(*c*) of the Supreme Court Act in respect of which an appeal lies to the Supreme Court of Canada.

Per BRODEUR, J., that the judgment of the Supreme Court of Alberta on appeal from the decision of a judge on preliminary objections filed under the Controverted Elections Act, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

Appeal quashed with costs.

Ewart, K.C., for the motion. *Lafleur*, K.C., and *O. M. Biggar*, contra.

N.S.] [April 7.

HALIFAX & SOUTH WESTERN RY. CO. v. SCHWARTZ.

Statute—Construction—Railway company—Right of way—Combustible materials.

Chapter 91, section 9, of the Revised Statutes of Nova Scotia, 1900, provides that "where railways pass through woods, the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise."

Held, that this provision is imperative and obliges the company at all times to keep its right of way so clear of combustible material that it will not be a source of danger from fire. Clearing it at certain periods only is not a compliance with such provision.

DUFF, J., dissented on the ground that it was not proved that the fire in this case originated on the right of way.

Judgment appealed from (46 N.S. Rep. 20), affirmed. Appeal dismissed with costs.

Mellish, K.C., for appellants. *W. J. O'Hearn*, for respondent.

Province of Manitoba.

COURT OF APPEAL.

RE TAYLOR AND CANADIAN NORTHERN RY. CO.

(9 D.L.R. 695.)

Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A.] [March 17.

Eminent domain—Rights of owner—Value at what time—Railway Act (Can.).

The exception of arbitrations then "pending" from the amendment made by 8 and 9 Edw. VII. (Can.) ch. 32, to the Railway Act, R.S.C. 1906, ch. 37, as to the time in relation to which the value of property expropriated is to be fixed where title is not acquired by the railway within a year from the date of depositing the plans, does not apply so as to exclude the ap-

plication of the amending Act, unless the arbitrators had taken office before the statute took effect after having been sworn in under sec. 197; so where, prior to the amending statute (1909), an order had been made appointing arbitrators, but one of them declined the appointment and a new arbitrator was not appointed until after the passing of the amending Act, the "arbitration" was not "pending" when the latter Act was passed.

Robinson v. *C.N.R. Co.*, 17 Man. L.R. 583, referred to.

A. B. Hudson, and *H. V. Hudson*, for Taylor. *P. A. Macdonald*, for the Canadian Northern Ry. Co.

GADSDEN v. BENNETTO (No. 2).

(9 D.L.R. 719.)

Howell, C.J.M., Perdue, Cameron and Haggart, JJ.A.] [March 17.

Fraud and deceit—Sale of shares—Secret profit on purchase by directors—Fiduciary relation—Officer purchasing stock from shareholder.

Held 1. When officers or directors of a company combine to dispose of all its property, the holding and disposal of which were the sole objects for which the company had been incorporated, under terms by which they would make a secret profit for themselves, the acquisition by them of shares at prices much below their real value, obtained from various shareholders by suppressing the real terms of the offer received for the company's property, is a fraud upon such shareholders in respect of which the court will grant them relief.

Gadsden v. *Bennetto*, 5 D.L.R. 529, reversed; *Hyatt* v. *Allen*, 8 D.L.R. 79, applied; *Percival v. Wright*, [1902] 2 Ch. 421, distinguished; *Carpenter* v. *Darnworth*, 52 Barb. (N.Y.) 581, distinguished.

2. Where directors of a landholding company passed a resolution appointing three of themselves as a committee to bring in a proposal for disposing of the whole of their lands and also of the corporate shares in the company, the responsibility of the members of the committee acting upon such resolution is more extensive than the ordinary duties devolving upon company directors; and, on any proposal of purchase being received by them which involved the acquisition of the land forming the

entire assets of the company, the committee were under a duty to the shareholders whose rights as such would, on completion of the sale, be limited to a reimbursement, pro rata, out of the purchase money, to make full disclosure to them as well as to the company, as represented by its directors and officers, of the terms of the offer. (*Per* Perdue, J.)

A. B. Hudson, for plaintiff. *Fullerton,* K.C., and *J. P. Foley,* for defendants.

KING'S BENCH.

THE KING *v.* WILLIS.

(9 D.L.R. 646.)

Galt, J.] [March 20.

Trial—Criminal prosecution — Alleged confession — Opening case.

Counsel for the Crown in a criminal prosecution may not, in opening the case to the jury, disclose the facts relied upon as constituting a confession by the accused until the court has decided that the evidence is admissible.

H. P. Blackwood, for the Crown. *C. H. Locke,* and *J. F. Davidson,* for prisoners.

Province of British Columbia

COURT OF APPEAL.

LAURSEN *v.* MCKINNON (No. 2.)

(9 D.L.R. 758.)

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [January 7.

Appeal—Extension of time—Notice of appeal—Courts—Rules of decision—Stare decisis—Re-enacted statutes—Construction of—Final judgment prior to fixing amount of damages—Time for appeal.

Held, 1. The British Columbia Court of Appeal has no power to extend the time within which notice of appeal should be given on an appeal to that court.

2. Interpretations of statutory language which have long been accepted, though their correctness may be open to doubt, will not ordinarily be disturbed, particularly where there is not an interference with a positive right.

Hamilton v. *Baker, "The Sara,"* 58 L.J.Adm. 57, 14 A.C. 209, 221, 222, considered.

3. Where a statute has been re-enacted, a construction given to the former statute by the courts ought to be adopted or at least it is a circumstance to which weight must be given.

4. Where a final judgment is to be perfected by the insertion of the amount of damages to be ascertained by the registrar, the time to appeal will run from the date of the judgment itself and not from the date when the judgment was finally perfected by inserting the amount of damages.

Bodwell, K.C., and *Ritchie,* K.C., for appellant. *L. G. McPhillips,* K.C., for respondent.

Book Reviews.

Principles of the Criminal Law with table of offences and their punishments, and Statutes. By SEYMOUR F. HARRIS, B.C.L., M.A. Twelfth edition by CHARLES L. ATTENBOROUGH, Barrister-at-law. London: Stevens & Haynes, law publishers, Bell Yard.

As all our readers know, this is a concise exposition of the nature of crime, the various offences punishable by the English law, the law of criminal procedure and the law of summary conviction. It is only necessary to tell the profession that there is a new edition of this standard work, for he who does not know "Harris" argues himself unknown. The last edition was published in 1908. Over eight important acts have since then been enacted by parliament, and are treated in this new edition. This is all that need be said.

Statute Law Making in the United States. By CHESTER LLOYD JONES, Associate Professor of Political Science in the University of Wisconsin. The Boston Book Company. 1912.

Of the slovenly work done in the world there is nothing much more remarkable than that done by Legislatures. An immense amount of time and money would be saved if competent persons

were employed in the various Legislatures of the Anglo-Saxon world to draft bills. This is especially true in new territories, but also applies to older settled ones. Mr. Jones has done good work by an intelligent discussion of this subject, and expresses his views clearly. The more ignorant a member of Parliament is, using that term in its wider sense, the more competent he thinks he is to frame a statute. It is necessary in new countries to have legislation of a novel character to meet new requirements, and whilst this should be done with boldness, it should also be done with extreme caution with due regard to precedents and examination of all existing legislation affecting the subject. As Mr. Jones says, "Bills are often drafted by men who have not made any attempt to see the proposed measures in the perspective of the general law of the state. As a consequence we have a mass of ill-considered statutes which, by their indefiniteness and failure to observe constitutional limitations, throw upon the courts a burden of interpretation which forces them frequently to resort to judicial legislation and to declare the statutes void. Popular prejudice is aroused against the judges who, because laws well intentioned but poorly drawn are declared void, are charged with being an obstruction to needed social advance. The blame which should fall upon the careless draftsman of the law too often is shifted to the court. But even if the bill stand the test of constitutionality, if it is not well drawn, it fails to accomplish its purpose."

Even in such of our legislatures as have a parliamentary draftsman—under whatever name he may be called—the legislature itself limits the scope of his usefulness: first, by not giving him a free hand in drafting or revising and, secondly, by introducing amendments intended to meet some special point raised in the legislature and which amendments are hurriedly passed without referring them to the officer whose knowledge is wanted at this stage more than at the first.

It seems strange that a little more money is not spent in obtaining the services of competent men to prepare the material for the legislative mill and that, when such men are occasionally obtained, the fullest use is not made of them.

The Law Quarterly Review.. January. Edited by Rt. Hon. Sir Frederick Pollock, Bart., D.C.L., LL.D. London: Stevens & Sons, Limited, 119 and 120 Chancery Lane.

This great English law review contains its usual interesting notes on a variety of subjects. The other matter is:—A further

discussion on contingent remainders in connection with the case of *Whitby* v. *Mitchell*—Vested remainder or executory devise—When will the English courts follow a foreign grant of probate or administration?—Locus regit actum and wills of foreigners in France—The super tax—Indictments for adultery and incest before 1650—The rescission of executory contracts for partial failure in performance—The universities and the legislature—Book reviews, etc.

Bench and Bar

Many tender enquiries have been made during the past few years as to what has happened to the promised revision of the statutes of the Province of Ontario. We may naturally expect that this long delay will give us a very much better result than we have had in the past, and we have reason to hope that this will be the case. It is said that it will not be a mere piecing together of odds and ends of sections, but rather something more like what the name implies. This might be expected from the capacity of those who have the matter in charge and from the time devoted to the work. We understand that all the material has been carefully revised and only awaits its being appropriately sorted out and located. It is said that further time will be taken to do this carefully, as well as to correct any minor errors that may have crept in, and so it is hoped that at the close of this year the profession of Ontario may have in their libraries the "Revised Statutes of Ontario, 1914," for it was apparently thought desirable to avoid the so-called unlucky figures 1913, or for some other reason refer to the later year.

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THE APPOINTMENT OF JUDGES—AND DELEGATION OF JUDICIAL DUTIES.

By the B. N. A. Act, s. 96, it is provided, that, "The Governor-General shall appoint the judges of the Superior, District, and County Courts, in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." The effect of this enactment appears to be to repeal all pre-existing powers for appointing judges, and all prior enactments providing for the appointment of judges in any of the Courts named, and from and after the 1st July, 1867, to vest the sole power of appointment in His Excellency the Governor-General.

It will be noticed that the section is somewhat peculiarly worded, and the exception is of something which is apparently not included in the preceding part of the section, which is confined to judges of Superior, District, and County Courts. Division Courts and Surrogate and Probate Courts and Justices of the Peace are not included in the prior part of the section, and because they are not so included, the Province of Ontario claims and exercises the right to appoint judges of Surrogate Courts and Justices of the Peace and Police Magistrates in Ontario, and it might also, if it saw fit, appoint judges of Division Courts: see *Re Wilson* v. *McGuire*, 2 Ont. 118.

All courts and judges having jurisdiction in the various provinces at the time of Confederation continued to exist and exercise jurisdiction after the B. N. A. Act took effect; but it seems reasonably clear that any powers theretofore exercised or conferred by the former Parliament of Canada, in reference to the future appointment of judges, or the future delegation of judicial functions, necessarily came to an end if in conflict with any express provision of the B. N. A. Act. Any other interpretation

of that Act would lead to an apparent conflict of jurisdiction, as to the appointment of judges.

The effect of s. 96 therefore appears not only affirmative of the jurisdiction of His Excellency the Governor-General to appoint judges of the courts referred to in that section, but also exclusive or extinctive of any other jurisdiction so to do.

At the time of Confederation certain statutes of the former Parliament of Canada were in force in Ontario, whereby authority was given enabling judicial powers to be conferred on persons who were not judges, *e.g.*, C.S.U.C., c. 11, s. 2, enabled commissions of assize to be issued to judges of the County Court and any of Her Majesty's Counsel learned in the law of the Upper Canada Bar; and 29-30 Vict., c. 391, which enabled sittings of the Court of Chancery to be held by "any one of Her Majesty's Counsel learned in the law of the Upper Canada Bar upon such counsel being requested by the Chancellor or one of the Vice-Chancellors to attend for the purpose; and such counsel while holding such sitting shall possess, exercise and enjoy all the powers and authorities of a judge of the said Court," and his decision was to be subject to appeal.

But these powers granted by the former Parliament of the Province of Canada seem to have come to an end on the passing of the B.N.A. Act for this reason; it is obvious that the Parliament of the Province of Canada on Confederation taking effect, ceased to have any power to appoint judges, or to confer judicial power—and it therefore seems to follow that if it could not itself exercise a power to appoint a judge neither could any person to whom it had delegated such power do so. The appointment of a person to act as a judge for a temporary purpose is none the less an appointment of a judge, and though his jurisdiction may be limited both as to time and duties, yet within those limitations he is to all intents and purposes a judge.

The commissions of assize referred to in C.S.U.C., c. 11, s. 2, were formerly issuable by the Crown as represented by the Governor-General of the former Province of Canada. But the right to issue commissions of assize as was determined in *Reg* v.

Amer, 42 U.C.Q.B. 391, is a prerogative right, and in that case a commission issued by the Deputy Governor-General of the Dominion was upheld; but the court declined to say whether or not a similar commission issued by the Lieutenant-Governor would be valid. The reporter adds a semble to his head note, to the effect that it would; but it seems to us the semble is not well founded, at all events, if the commission purported to empower persons who were not duly appointed judges by the Governor-General, to act as judges. For the trial of the Biddulph murder case commissions were issued both by the Governor-General and the Lieutenant-Governor.

The power conferred by C.S.U.C., c. 11, s. 2, to appoint temporary judges of assize it seems to us can now only be exercised by the Crown as represented by the Governor-General, to hold otherwise is virtually to create an exception to s. 96 of the B.N.A. Act.

In like manner the power formerly conferred on the Chancery judges to appoint a Queen's Counsel to hold sittings of the Court of Chancery would seem to have come to an end at the passing of the B. N. A. Act, because the Parliament which conferred it having become defunct, and being no longer able itself to exercise the power, neither could its delegates do so, otherwise it could be in effect perpetuating its authority after it had ceased to exist and after its authority had been transferred to some other functionary. If, for instance, the Parliament of the former Province of Canada had conferred on the judges of the Court of Chancery power to appoint judges to that Court as often as vacancies occurred, could it be pretended that such power could now be exercised? Surely not. Can it make any difference because the power they had was merely to appoint temporary judges?

The Ontario Legislature, however, appears to have thought otherwise, and it has not only introduced the provisions of C.S.U.C., c. 11, and 29-30 Vict., c. 39, into the Provincial Statute Book, but has also from time to time supplemented them with similar legislation: see 37 Vict., c. 7, s. 36, and has purported

to empower not only Queen's Counsel but retired judges of any of the Superior Courts to hold sittings of assize and nisi prius and oyer and terminer and general gaol delivery, upon being requested by any of the chief justices or judges of the Superior Courts so to do. And by s. 28 a retired judge as well as a Queen's Counsel was empowered to hold sittings of the Court of Chancery, on the request of the Chancellor or either of the Vice-Chancellors, and judicial powers were purported to be conferred on such retired judge or Queen's Counsel so holding a sitting.

These or similar provisions were perpetuated in the Ont. Jud. Act, R.S.O. (1897), c. 51, ss. 10, 11, 188, and they are continued in the revised Judicature Act recently passed.

With all due respect, we think this is a mistake. We have, we submit, given very sufficient reasons why the right of both retired judges, and King's Counsel, to act as judges under authority purported to be conferred by pre-Confederation statutes or by Ontario statutes, is open to the gravest doubt; and suitors ought not to be exposed to the dilemma of having either to admit a jurisdiction which is to say the least doubtful, or to be put to the expense of contesting it. Such a matter as the jurisdiction of the person assuming to act as judge ought to be removed from the realm of controversy.

This subject was very carefully considered in 1905 by a Committee of the Law Society whose report is to be found in vol. 4 of the proceedings of Convocation, p. 51 et seq. The conclusions of the committee, we think, in the main agree with what has been heretofore stated, at the same time, it must be admitted, hardly with that definiteness which could be wished. With regard to the legislation authorising the appointment of K.C.C., to act as judges, the committee made no suggestion, but they seem to stand on a similar footing to retired judges. With regard to retired judges the committee recommend that the Attorney-General of Ontario should introduce legislation to repeal every statutory duty assumed to be assigned to a retired

judge and in support of that suggestion referred to *Wilson* v. *McGuire; Gibson* v. *McDonald*, supra.

In view of what has been said, we venture to think the Provincial Government if it seriously intends to maintain its right to pass Acts such as we have referred to, should in some way obtain an authoritative pronouncement of the Supreme Court of Canada as to the validity of the Provincial enactments we have called in question, or if it does not intend to maintain that position it should repeal them, or suffer them to drop from the statute book as being obsolete or ultra vires.

The appointment of judges who were appointed by His Excellency judges of the High Court of Justice, to be judges of the Court of Appeal is assumed to be within the power of the Provincial Legislature; but if it may appoint a judge of the High Court to be a judge of the Court of Appeal, why may it not also appoint a County Court judge to be a judge of the Court of Appeal? It has in fact assumed to appoint all County Court Judges to be local judges of the High Court: Ont. Jud. Act, s. 185. Is not all this a trenching on the powers of His Excellency? see *Gibson* v. *McDonald*, 7 Ont. 401. It may possibly be that the commission of these judges may also entitle them so to act, and if so this would be a sufficient authority even though s. 185 were ultra vires. It is also assumed that the local Legislature has power to authorise the appointment of ad hoc judges to the Court of Appeal the legality of which also seems extremely doubtful, although the authority so conferred has been many times acted on.

If the question of the right of such a judge to sit were ever called in question it might be held that the whole proceedings in which he took part by reason of the presence of such ad hoc judge was coram non judice. In order to prevent such questions from arising in the future, it may be necessary in some way to give proper legislative authority to what has been done.

The constitution of the Railway and Municipal Board and the appointment of Drainage Referees, a Mining Commissioner and a Municipal Arbitrator to do what is strictly judicial work

withdraws from the ordinary courts a very large volume of business, and it is hard to see where a line is to be drawn which would prevent all civil business from being withdrawn from the courts referred to in s. 96 of the B. N. A. Act and transferred to new tribunals which are neither Superior or County Courts, and presided over by judges appointed and paid by the Province. This, in effect, was what was attempted to be done by the Province of Quebec; but the Provincial Legislation was disallowed as being a violation of the B. N. A. Act: see 21 Ont., p. 172-3.

THE CHAIRMAN OF THE DOMINION RAILWAY BOARD.

In a recent number of a legal contemporary there is an article criticising a ruling of the Board in reference to an application by the City of Toronto to change some rates imposed by the Bell Telephone Company. The writer of the article referred to finds it "extremely difficult to understand" how the decision was arrived at. He does not say, however, whether he heard the evidence and the arguments before the Board or the reasons given for the result arrived at. Being ourselves in the same position we do not pretend to say whether the critic or the Board was in the right of it. We do, however, propose to say something as to other observations in the article referred to.

The writer very properly eulogises the good work done by the late Judge Mabee, though it is scarcely fair to the eminent men who preceded him to say that the high position attained by this tribunal was due to *his* Chairmanship; nor, as the writer appears to hint, that it partly attained this eminence by giving decisions oftenest adverse to corporations. It will be seen, however, that these encomiums are really for the purpose of drawing a comparison between the previous Chairman of the Board and the present one, to the disadvantage of the latter. And so the writer thinks "it would be a pity if (by Mr. Drayton's action on the application referred to) the standard set up by

the Dominion Board up to the present should be lowered and that it should descend to the level at times reached by its prototype of Ontario."

Now as to the criticism on Mr. Drayton's action. It will scarcely be credited that a legal journal could take the ground of objection that the *Canadian Law Times* does. It appears that Mr. Drayton declined to sit on this application because he had been concerned in the matter as Corporation Counsel for the City of Toronto and had given an opinion thereon to his then clients. It is surely unnecessary to say that Mr. Drayton simply did what any professional man would have done under similar circumstances, viz., he declined to sit on the case for the reason stated. This is a proposition in professional ethics so simple as to be obvious to anyone, be he lawyer or layman. But here we have a legal journal finding fault with this most commendable and proper action, for his doing otherwise than he did would have been a gross breach of the obviously proper rule and the universal practice obtaining under similar circumstances.

We notice that even a lay journal (*Ottawa Evening Journal*) takes this ground and it may be interesting to quote its words:—

"The value of this criticism may be judged in part from the fact that Mr. Drayton is specially blamed by the Toronto publication because he has refrained from taking part in the hearing of or decisions in disputes between Toronto and certain public-service corporations. Mr. Drayton's reason for refraining is that he was the Toronto city solicitor prior to becoming Chairman of the Railway Commission. As city solicitor, he, of course, committed himself to the city side. What sort of an umpire of such cases would he be accepted as now? The *Law Times* is silly. The fact is, so the Journal believes, and this is a good time to say it, the Railway Commission never stood higher in public estimation. Mr. Drayton has more than 'made good.' And Mr. Scott, the Assistant Chief Commissioner, has always, through his ability, fairness and public spirit, been a strength to the Board not perhaps fully realised by the public.

At any rate, the conclusion indicated by ordinary observation is that the Dominion Railway Commission has never been doing better work than recently."

As to the standing of the Board as at present constituted, we concur with the above observations. During the short period that Mr. Drayton has been Chairman, he has shewn ability to quickly master the details of an intricate subject. His opinions have been judicial, and have, in the main, commended themselves to all parties interested. It is, of course, not to be expected that a new member of the Board could, in a few months, attain the position of those who have preceded him who, moreover, had a previous judicial training, but there is every reason to believe that Mr. Drayton will be equal to the best traditions of the position he now occupies.

THE EFFECT OF AN EXECUTOR'S ASSENT.

The decision in the recent case of *Attenborough* v. *Solomon*, 107 L.T. Rep. 833; (1913) A.C. 76, and the dicta of Lord Haldane in the House of Lords will, no doubt, have the effect of calling attention to the inherent vulnerability of titles taken from executors, and the risks run by purchasers and mortgagees in dealing with an executor. These risks have always existed, whether the property sold or mortgaged be chattels personal (commonly spoken of as chattels), or chattels real, or real estate —for now real estate with certain exceptions may be said to stand on the same footing as chattels real, so far as regards the point under consideration. The recent decision, and perhaps particularly the dicta of the Lord Chancellor, may be a little disturbing, but they have not effected any alteration in the law.

The inherent vulnerability referred to above arises from the principle of law—and it is important to observe that it is a principle of law and not one of equity—that on the executor's assent the property vests in the legatee. It is not within the scope of this article to enter into a minute examination of the occasions, on the one hand, where an assent has been held to

have occurred, and those, on the other hand, where the courts have refused to recognise a purported or alleged assent; but it is desirable to remind the reader, first, that an assent need not be evidenced by writing, nor need it be express; and, secondly, that it is not a condition precedent for the validity of an assent that possession of the property must pass on the assent being given.

It is said in Touchstone that certain words of congratulation used by an executor to the legatee will have the effect of an assent: Shep. Touch. 456. Candidly, we doubt this, although Dodderidge, probably the real author of that ancient work, was a very learned judge. But there are numerous authorities which shew assent may not only be verbal, but implied from conduct. "The principle established," said Chief Justice Gibbs, delivering a considered judgment in *Doe* v. *Sturges* (1816), 7 Taunt, 217, at p. 223, "is that if an executor in his manner of administering the property does any act which shews that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy; but if his acts are referable to his character as executor, they are not evidence of an assent to the legacy."

Secondly, assent is not necessarily accompanied by a change of possession. It was held that there had been an assent where the executor had informed the legatee that the legacy lay ready for him when he would call for it (*Camden* v. *Turner,* cited by Mr. Justice Buller in *Hawkes* v. *Saunders* (1872), 1 Cowp. 289, at p. 293); and where the executor had in the case of a legacy of leaseholds paid the ground rent and charged the same in account against the legatee: *Doe* v. *Mabberley,* 6 Car. & P. 126. In the recent case an assent was implied although the executor still retained exclusive possession of the piece of plate in question.

The point which was especially dwelt upon by Lord Haldane in his judgment in *Attenborough* v. *Solomon,* 107 L.T. Rep. 833; (1913) A.C. 76, is the rule of law that on the executor's assent the property vests in law in the legatee. This point is not, as we have already said, a new one. As regards chattels personal—*i.e.*, chattels in the common acceptance of the term

—the cases are clear. "It never could be doubted," said Lord Ellenborough in *Doe* v. *Guy* (1802), 3 East, 120, at p. 123, "but that at law the interest in any specific thing bequeathed vests in the legatee upon the assent of the executor." The report of *Barton's* case (1677), Freem. K.B. 289, states authoritatively that "when a certain thing as a horse or a cow is devised, as soon as the executor assents the property vests in the legatee, and he may have an action at common law for the recovery of the thing."

So much for chattels personal. Is there any distinction between them and chattels real, such as leaseholds? For our purposes there is none. On the assent of the executor to a gift of leaseholds the legatee acquires the legal interest in the legacy. In the words of Lord Ellenborough, it makes no difference whether the bequest be of a personal or a real chattel: *Doe* v. *Guy,* sup., at p. 123. To cite a more recent authority, Mr. Justice Kekewich in *Re Culverhouse; Cook* v. *Culverhouse,* 74 L.T. Rep. 347; (1896), 2 Ch. 251, holding that specifically bequeathed leaseholds vested absolutely in the legatee on the executor's assent, made the following observation: "It is an exception from the general law that a man requires, in order to complete his title, something in the nature of a conveyance." Lord St. Leonards was fully aware of the risk involved in taking an assignment of leaseholds from an executor, for he advised that this could not be safely done without the concurrence of the legatee for fear of there having been a previous assent to the bequest: see 2 Sug. V. & P., 9th ed., p. 56.

As regards realty, other than land of copyhold or customary tenure, the Land Transfer Act, 1897, now provides that a deceased person's real estate shall vest on death in his personal representatives as if it were a chattel real notwithstanding any testamentary dispositions: s. 1 (1). The second sub-section of s. 2 provides that all rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealings with chattels real before probate or administration, and other matters in relation to the administra-

tion of personal estate, and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, shall apply to real estate, so far as applicable, as if that real estate were a chattel real vesting in the personal representatives. Subject to those powers, rights, duties, and liabilities, the personal representatives hold the real estate as trustees for the persons by law beneficially entitled: s. 2 (1). What is of particular importance for our purposes is the provision that at any time after the death of the owner of any land his personal representatives may *assent* to any devise contained in his will; and on such assent all liabilities of the personal representatives in respect of the land are to cease, except as to any acts done or contracts entered into by them before such assent: s. 3 (1).

Thus the vulnerability of titles to chattels personal and chattels real derived from executors due to a possible previous assent on the part of the executor is extended to specifically devised realty, so that the purchaser of real estate from executors may find himself deprived of the legal estate by a previous assent. This may be an argument for the compulsory registration of titles to land, but it appears to be a much more potent one for amending legislation doing away with the passing of the legal estate on a verbal or implied assent. Fortunately such legislation is in fact in contemplation.

Such, then, being the law as regards the effect of the executor's assent, the question arises whether there are any principles which protect purchasers and mortgagees taking a title to chattels, leaseholds, or freeholds from an executor.

There are certain highly convenient rules designed for the protection of persons dealing with executors. "Where a person," said Mr. Justice Stirling in *Re Venn and Furze's Contract,* 70 L.H. Rep. 312; (1894), 2 Ch. 101, at p. 114, "who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as executor, unless there is something in the transaction which shews the contrary." "A mortgagee or purchaser," said Vice-Chancellor Leach in *Wat-*

kins v. *Check* (1825), 2 Sim. & St. 199, at p. 205, "from the executor of a part of the personal property of the testator has a right of infer that the executor is, in the mortgage or sale, acting fairly in the execution of his duty, and is not bound to inquire as to the debts or legacies."

Although prior to the Land Transfer Act, 1897, realty did not devolve on the executors, yet if the land was devised to executors charged with debts there was an implied power of sale for the purpose of raising the debts. In such a case as this a purchaser from the executor could not insist on proof that debts remained to be paid. He had to assume it; and unless he had notice to the contrary he was amply protected, unless the sale was more than twenty years after the testator's death, in which case he was put on inquiry: see *Re Tanqueray-Willaume and Landau*, 46 L.T. Rep. 542; 20 Ch. Div. 465. Again, in purchasing from an executor leaseholds specifically bequeathed, the purchaser is entitled to assume that the executor is selling for the purpose of administration, as *e.g.*, for the purposes of raising money to pay the debts and expenses incurred in the administration. He cannot compel the executor to answer a requisition whether any debts remain to be paid: *Re Whistler*, 57 L.T. Rep. 77; 35 Ch. Div. 561; and the fact that twenty years have elapsed since the testator's death does not alter the position: *Ibid.; Re Venn and Furze's Contract*, sup.

These convenient rules, however, do not touch the question of assent. If an assent has in fact been given before the executor purports to deal with the subject-matter of the bequest or devise by sale or mortgage to a third party, the title of that third party is defective. Property in the subject-matter of the bequest—the legal estate, in the case of realty—passed from the executor on the assent, and any subsequent purported dispostion must necessarily be ineffectual, for Memo dat quod non habet.

Third parties dealing with personal representatives may, however, be consoled by the following reflections: That the implied assents (the most dangerous of all) are not, as a rule, con-

sistent with the retention thereafter by the executor of the subject-matter of the bequest; that, as is shown by such a case as *Thorne* v. *Thorne*, 69 L.T. Rep. 378; (1893), 3 Ch. 196, the court will not readily extend the doctrine of implied assent; that as regards realty, an express assent when in writing is a document of title, and so must be disclosed by the abstract; and, lastly, that the mischief of verbal assents in the case of realty will soon be remedied by statute.—*Law Times.*

"MAY" READ AS "MUST."

The primary and natural meaning of the word "may" is permissive and enabling only. Of that there cannot be the slightest doubt; "though dicta of eminent judges may be cited to the contrary," as was remarked by Lord Selborne in *Julius* v. *Bishop of Oxford*, 42 L.T. Rep. 546; 5 App. Cas. 214, at p. 235. It "can never mean 'must' so long as the English language retains its meaning," to quote the statement made by Lord Justice Cotton in *Re Baker; Nichols* v. *Baker*, 62 L.T. Rep. 817; 44 Ch. Div. 262, at p. 270. Where it has been held to be used in the sense of imposing an obligatory duty—directory and not merely discretionary—it is because a power having been conferred by the word "may" it becomes a duty to exercise it. That is to say, where it is essential to treat the word as imperative for the purpose of giving full effect to a legal right. And there are many cases in which such has been the judicial interpretation arrived at. The most recent of them is that of *Rex* v. *Mitchell*, 108 L.T. Rep. 76, decided by the Divisional Court, consisting of Justices Ridley, Coleridge, and Bankes. It related to a person who was charged with an offence under the Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict., c. 86. Mr. Justice Ridley was of opinion that the word "may" in the phrase of s. 9 of that Act, "the court of summary jurisdiction may deal with the case in all respects as if the accused were charged with an indictable offence," ought to be interpreted as being used in a discretionary and enabling and not in an imperative sense. The majority of the learned judges, however, took a contrary

view, holding that, although the words of the section are "may deal" and not "must deal," the court of summary jurisdiction is bound to treat an offence as an indictable one if the accused objects to being tried by that court, and cannot deal with it as punishable on summary conviction. The case was admittedly a somewhat difficult one, and much, perhaps, there is to be said in favour of either conclusion. A divergence of opinion is, therefore, no matter for great surprise. But if the legal right which an accused person possesses under the section of objecting to being tried by a court of summary jurisdiction—demanding instead to be sent for trial by a jury—is capable of being completely frustrated by the court exercising a discretionary power antagonistic to that right, it becomes practically worthless. This can scarcely have been the intention of the Legislature. Though why the word "may" was used in place of "shall" is not easy to explain if the right to claim a trial by jury was meant to be inherent. Discretion, however judicially exercised, which can balk the accused of his desire reduces the statutory authorisation to a mere nullity. The present case seems, therefore, to be a signal example of that class of case where it is necessary to treat the word "may" as compulsory, inasmuch as, if not, a legal right might be clearly defeated. It lies, of course, upon those who contend that an obligation exists to exercise the faculty or power conferred by the word "may" to show, in the circumstances of the case, something which creates an obligation. This was pointed out by Lord Cairns in *Julius* v. *Bishop of Oxford* (ubi sup.). Then the word which, in its ordinary meaning, is merely potential, becomes imperative. For where, as in the present case, the object of the power is to enable the justices on whom it is conferred to effectuate a legal right, they can have no option in the matter. It must be their duty to exercise the power when called upon to do so. The opportunity of taking advantage of the legal right might otherwise be lost to the accused. The existence of the general principle was as fully recognised by Mr. Justice Ridley as by his learned colleagues. But in the application thereof to

the present case was where their Lordships differed. Mr. Justice Ridley's observation, however, that "if it had been intended to give to the accused person the right to claim to be tried before a jury the Act might easily have said so in definite language," unfortunately carries no weight. Reference to the authorities collated, and analysed with masterly skill, in Stroud's Judicial Dictionary under the title "May" shews how frequently such a simple course has been ignored.—*Law Times.*

THE TRUE THEORY OF THE COMMON LAW.—"In all sciences, says Lord Bacon, they are the soundest that keep close to particulars. Indeed, a science appears to be best formed into a system by a number of instances drawn from observation and experience, and reduced gradually into general rules; still subject, however, to the successive improvements, which future observation or experience may suggest to be proper. The natural progress of the human mind, in the acquisition of knowledge, is from particular facts to general principles. This progress is familiar to all in the business of life; it is the only one, by which real discoveries have been made in philosophy; and it is the one, which has directed and superintended the instauration of the common law. In this view, common law, like natural philosophy, when properly studied, is a science founded on experiment. The latter is improved and established by carefully and wisely attending to the phenomena of the material world; the former by attending, in the same manner, to those of man and society. Hence, in both, the most regular and undeviating principles will be found, on accurate investigation, to guide and control the more diversified and disjointed appearances."

Lord Coke says, "Reason is the life of the law, nay, the common law itself is nothing else but reason; which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason; for, Nemo nascitur artifex. This legall reason is summa ratio. And therefore if all the reason that is dispersed into so many severall heads were united unto one, yet could he not make such a law as the law of England is."

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

SHIP—BILL OF LADING—EXEMPTION FROM LIABILITY—FIRE—PERILS OF ICE—DANGEROUS CARGO—DEFECTIVE STORAGE—STORAGE RENDERING VESSEL UNSEAWORTHY—WARRANTY OF SEAWORTHINESS—MAINTENANCE OF VESSEL'S CLASS—MERCHANT SHIPPING ACT, 1894 (57-58 VICT., *c.* 60) *s.* 502.

Ingram v. *Services Maritime* (1913) 1 K.B. 538. This was an action against ship owners for the loss of cargo. The plaintiffs shipped the goods in question to be carried from Le Tréport to London on board the defendant's ship on the terms of a bill of lading which contained the following exemptions from liability: (1) Fire on board . . . and all accidents, loss, and damage whatsoever from . . . the perils of the seas . . . or from any act, neglect or default whatsoever of the master, officers, crew, stevedores, servants, or agents of the owners . . . in the management, loading, storing . . . or otherwise . . . "(11) It is agreed that the maintenance by the shipowners of the vessel's class . . . shall be considered a fulfilment of every duty, warranty, or obligation whether before or after the commencement of the voyage." By s. 502 of the Merchants Shipping Act, 1894, it is provided that the owners of a British sea-going ship is not liable to make good any loss or damage happening without his actual default or privity where any goods or other things put on board his ship are lost or damaged by reason of fire on board the ship. In addition to the plaintiffs' goods the defendants took on board at Le Tréport, a quantity of sodium saturated with petrol—which was insecurely and insufficiently packed. This was stowed upon the deck and the vessel encountering rough weather the packages got loose and were damaged, and water got to the sodium which produced fire and explosions which set fire to the ship and caused its total loss. The defendants denied liability for the loss of the plaintiffs' goods claiming to be protected from liability both under the statute and the clauses of the bill of lading above referred to. Scrutton, J., who tried the action, held that the bill of lading having made express provision for loss by fire the provision of the statute was thereby excluded, and afforded the defendants no defence. And under

the terms of the bill of lading he held that the defendants were liable, because they did not exempt defendants from liability for unseaworthiness and the implied warranty of seaworthiness had been broken by the way in which the sodium had been packed and stowed—that the clause in the bill of lading as to non-liability for negligence in stowing only applied where the ship was seaworthy, and ample meaning was given to it by restricting it to negligent stowage causing damage to the cargo, but not rendering the ship unseaworthy. And he held that the clause as to the maintenance by the ship-owners of the vessel's class, was too vague to relieve the defendants from their implied warranty of seaworthiness. He therefore held that notwithstanding the terms of the bill of lading and the statute, the defendants were liable for the loss of the plaintiffs' goods.

CRIMINAL LAW—"SECOND OR SUBSEQUENT CONVICTION"—ADDITIONAL PUNISHMENT IMPOSED BY STATUTE FOR SECOND OFFENCE AFTER FIRST, BUT BEFORE SECOND CONVICTION.

The King v. *Austin* (1913) 1 K.B. 551, is an instance of the care with which criminal law is administered in England. The defendant had been convicted as a rogue and vagabond for living on the earnings of prostitutes. After his conviction an Act was passed providing that persons on a second conviction for such an offence should be subject to whipping. The defendant was so convicted for a second offence after the Act and sentenced by Darling, J., to be whipped, but the learned judge appears to have required the question whether the defendant was liable to be whipped to be argued, which was accordingly done by counsel instructed by the Registrar of the Court of Criminal Appeal. The Court of Criminal Appeal (Ridley, Phillimore, and Avory, JJ.) held that the Act imposing the additional punishment applied to the case of a second conviction after it came into force notwithstanding the prior conviction took place prior to the passing of the Act. As the court says, "No man has such a vested interest in his past crimes and their consequences as would entitle him to insist that in no future legislation shall any regard whatsoever be had to his previous history." The sentence was therefore affirmed.

STATUTE—CONSTRUCTION "MAY" EQUIVALENT TO "MUST."

The King v. *Mitchell* (1913) 1 K.B. 561. In this case the defendant was accused before magistrates of an offence under

an Act for which a penalty amounting to £20 and imprisonment was imposed. By statute a person so accused may, on appearing before a court of summary jurisdiction, declare that he objects to being tried for such offence by a court of summary jurisdiction, and thereupon the court of summary jurisdiction "may" deal with the case in all respects as if the accused were charged with an indictable offence and not an act punishable on summary conviction. The defendant objected to being tried by the magistrates, but they nevertheless proceeded to try the case, and convicted him. On appeal the majority of the Court of Criminal Appeal (Lord Coleridge and Bankes, JJ.) held that this was wrong, and that "may" meant "must." Ridley, J., however, dissented and thought it was merely permissive.

LEASE—ASSIGNEE OF REVERSION—CLAIM BY LESSEE AGAINST LESSOR FOR DAMAGES FOR BREACH OF CONTRACT—ACTION FOR RENT BY ASSIGNEE OF REVERSION—SET-OFF BY LESSEE.

Reeves v. *Pope* (1913) 1 K.B. 637. This was an action by the mortgagees of the reversion of a lease to recover rent, and the defendant claimed to be entitled to set off a claim for damages which she had against her lessors, in the following circumstances. The London and North-eastern Estates Company, being lessees for a term of 99 years, agreed to erect a hotel on the premises by 25th March, 1911, of which the defendant agreed to become lessee. The defendant failed to erect the hotel by the day named, and it was not ready for occupation until November 13, 1911, on which date the defendant accepted a lease for 28 years at the agreed rent but without prejudice to her claim for damages for the non-completion of the hotel as agreed. On the 16th November, 1911, the company assigned its lease of ninety-nine years for the whole term less three days by way of mortgage to the plaintiffs who had notice of the defendant's claim. The defendant's claim to set off was attempted to be supported under the provisions of the Judicature Act relating to assignments of choses in action; but Bankes, J., held that they had no application, as the claim of the plaintiffs was founded on their legal title as assignees of the reversion, and as such they could have distrained for the rent, and as if they had done so, the defendants could not have maintained any right of set-off in answer to the distress, so he considered they might also sue for the rent without subjecting themselves to any liability to such set-off.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lords Macnaghten, Atkinson, and Moulton.] [Jan. 31.

THE KING AND ANOTHER *v.* ROYAL BANK OF CANADA AND OTHERS.

British North America Act, 1867, (30 & 31 *Vict.*, *c.* 3, *ss.* 91, 92—*Powers of Provincial Government—Statute dealing with civil rights outside province—Ultra vires.*

On appeal from the Supreme Court of Alberta.

The principle that money, in the hands of one person, which in justice and equity belongs to another, may be recovered as money had and received to the use of the true owner applies to money paid for a consideration which has failed.

Therefore, where bondholders in London had advanced money for the construction of a railway, which scheme had become abortive, and the money was lying at a bank in Alberta:

Held, that the Provincial Legislature had no power to pass a statute dealing with such money, the right of the bondholders to recover it being a civil right outside the province, and not within the powers conferred on the Provincial Legislature by s. 92 of the British North America Act, 1867.

Judgment of the court below reversed.

Their Lordships said they were "not concerned with the merits of the political controversy which gave rise to the statute the validity of which is impeached. What they have to decide is the question whether it was within the power of the Legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that in a case such as this it was in the power of that Legislature to repeal subsequently any Act which it had passed. If this were the only question raised the appeal could be disposed of without difficulty. But the Act under consideration does more than modify existing legislation. It purports to appropriate to the province the balance standing at the special accounts in the banks, and so to change the posi-

tion under the scheme to carry out which the bondholders had subscribed their money."

Buckmaster, K.C., *Martin*, K.C., and *Geoffrey Lawrence*, for the plaintiffs, respondents. *Sir R. Finlay*, K.C., *R. B. Bennett*, K.C., *J. H. Moss*, K.C., and *W. Finlay*, for the defendants, appellants.

Province of Ontario.

COURT OF APPEAL.

Hodgins, J.A.] [March 1.

FAIRWEATHER *v.* CANADIAN GENERAL ELECTRIC CO.

(10 D.L.R. 130.)

Master and servant—Liability of master—Whether employee was within sphere of duties—Safety as to place and appliances—Servant's assumption of risks—Knowledge of defect—Evidence—Weight and efficiency—Negligence imperiling employee.

A foreman in charge of an electric power-house is acting within the sphere of his employment when he himself does or assists in doing necessary work which ordinarily would be done by others under his charge upon whom he had the right to call, unless it is shewn that his authority was limited by his employer to the requisitioning of help in such cases.

Barnes v. *Nunnery Colliery Co.*, [1912] A.C. 44, and *Whitehead* v. *Reader*, [1901] 2 K.B. 48, referred to.

It is the duty of the employer to provide proper appliances for the employees and to maintain them in a proper condition and so to carry on his operations as not to subject those employed by him to unnecessary risk.

Smith v. *Baker*, [1891] A.C. 325, applied; *Schwab* v. *Michigan Central R. Co.*, 9 O.L.R. 86, and *Can. Woollen Mills* v. *Traplin*, 35 Can. S.C.R. 424, referred to.

Neither the employee's knowledge of a defect in the condition of the works due to the employer's negligence, nor the continuance in the employment, is conclusive evidence of willingness on the part of the employee to incur the risk.

Church v. *Appleby*, 60 L.T. N.S. 542; *Yarmouth* v. *France*, 19 Q.B.D. 647; *Smith* v. *Baker*, [1891] A.C. 325; *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q.B. 338; *Grand Trunk Pacific R. Co.* v. *Brulott*, 46 Can. S.C.R. 629, 13 Can. Ry. Cas. 95, referred to.

When a workman in the course of his employment is placed in a position of peril by the negligence of his master in the construction of the works and ways of the master, and an accident happens to the workman in the way that might be expected from the negligence found, a jury can infer that the negligence caused the accident.

McKeand v. *C.P.R.*, 1 O.W.N. 1059, 2 O.W.N. 812, referred to.

E. G. Porter, K.C., for plaintiff. *G. H. Watson*, K.C., and *L. M. Hayes*, K.C., for the defendants.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ.] [March 18.

MILLER *v.* HAND (No. 2.).

(10 D.L.R. 186.)

Brokers—Real estate agent's purchase in own name—Liability to account for profits.

An agent selling land cannot make a profit for himself at the expense of his principal; and so if the agent fraudulently purchases the land himself, and afterwards makes a profit on the re-sale he is accountable to his principal for the amount of his profit less the commission on such profit.

Miller v. *Hand* (No. 1), 8 D.L.R. 465, affirmed on appeal.

Watson, K.C., for defendant. *Kilmer*, K.C., for plaintiff.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ.] [March 19.

GRAHAM CO. *v.* CANADA BROKERAGE CO.

(10 D.L.R. 107.)

Sale—Tender of second sample—Refusal to inspect.

The buyer is not entitled to withdraw from his contract on the ground that one box of merchandise (*ex gr.*, evaporated apples),

forwarded as a sample was not satisfactory, where the contract of sale contained a stipulation that it was "subject to the approval of fire boxes, when ready for shipment"; the buyer must still inspect and pass upon a shipment of five boxes forwarded for the approval of the buyer in accordance with the terms of the contract and if the buyer refuses even to inspect these shipments, on the ground that the rejection of the one box operated as a termination of the contract, the seller may re-sell the goods and recover damages.

Borrowman v. *Free,* 4 Q.B.D. 500, applied.

Shirley Denison, for defendants. *M. Wright* and *W. D. M. Shorey,* for plaintiffs.

Middleton, J.] [March 20.

NIAGARA AND ONTARIO CONSTRUCTION CO. *v.* WYSE AND UNITED STATES FIDELITY AND GUARANTY CO.

(10 D.L.R. 116.)

Bond for indemnity and security—Contractor's bond—Principal and surety—Waiver of claims—Release of surety—Rights and remedies of a surety—Credit for allowances waived—Contractor's bond—Advances to assist completion of contract.

Where a guaranty company entered into a bond which was conditioned that a sub-contractor would "well and faithfully in all respects perform, execute and carry out the said contract," and recited that annexed to the bond was a copy of the contract in question, which, however, did not contain some slight alterations made on the final revision of the contract as re-executed by the parties after the date of the bond, the guaranty company are not relieved from liability if the words inserted do not alter the meaning of the contract in any way, since the guaranty company was not prejudiced by an immaterial alteration.

Tolhurst v. *Portland Cement Manufacturers,* [1903] A.C. 422; *Harrison* v. *Seymour,* L.R. 1 C.P. 518; *Croydon, etc., Co.* v. *Dickinson,* 2 C.P.D. 46, referred to.

A waiver of a claim for damages which may arise out of delays or interruptions in the performance of a contract does not constitute any material change in the contractual obliga-

tions of the parties, or enlarge the liabilities of the surety, so as to operate as a discharge of the contractor's surety.

Where a person under bond for the performance of work waives any claim for an allowance arising out of the contract, his surety will be entitled, on the taking of the accounts, to credit for the amount voluntarily released.

Where a sub-contractor has completed his work and performed his contract with the assistance of advances made him by his head contractor, the latter cannot recover these advances from the surety of the sub-contractor who entered into a bond conditioned for the due performance of the work, such being beyond the conditions expressed in the bond; if, however, the head contractor had completed the work on his own account upon the sub-contractor's default and charged the cost thereof against the sub-contractor deducting from this amount the sums due under the contract, the surety would still be liable, provided notice as required by the contract had been duly given to the surety.

Cadwell v. *Campeau*, 3 D.L.R. 555, referred to.

W. N. Tilley, and *A. W. Ballantyne*, for plaintiffs. *R. McKay*, K.C., and *W. B. Milliken*, for defendants.

Wyse appeared in person.

Meredith, C.J.C.P.] [March 26.

SCOTT *v.* GOVERNORS OF UNIVERSITY OF TORONTO.

(10 D.L.R. 154.)

Workmen's Compensation Act—Negligence—When contributory negligence a defence—Degree of care—Master and servant—Employers' liability—Common employment—Common law—Change of rule by workmen's compensation enactments.

In actions for damages for injuries under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, the plaintiff cannot be proved guilty of contributory negligence by proving only that he could have avoided the accident; it must be shewn that he could have avoided it by the exercise of such care as persons acting in the like capacity and under similar circumstances ordinarily would have exercised.

Although an employer is not liable at common law for injuries to an employee sustained by reason of the negligent act of a foreman, if the machinery supplied is proper and usual and

the employer has taken reasonable precautions to insure the safety of his employee; yet, under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, there may be liability in such cases, where the plaintiff (at the instance of a third party, employed by the defendants, to whose orders the plaintiff, in the same employment, was bound to conform) is required by such third party to do, and does, certain work in the doing of which the plaintiff is injured through such third party's negligence.

Dewart, K.C., for plaintiff. *Paterson*, K.C., for defendants.

Middleton, J.] [March 31.

BASHFORD *v.* PROVINCIAL STEEL CO.

(10 D.L.R. 187.)

Corporations and companies — Officers — Status of directors — Master and servant—Grounds for discharge of employee.

There is no legal incompatibility between the office of director of a company and any other office in the service of the company, for directors do not stand in the position of masters to the officers of the company, but are themselves the servants of the company.

King v. *Tizzard*, 9 B. & C. 418, referred to.

There is no absolute legal rule as to what is a justification for the dismissal of an employee before his term of employment has expired; each case must stand on its own merits; lack of executive ability resulting in great financial loss to a company is sufficient to justify the dismissal of their general works manager.

Field, K.C., and *W. F. Kerr*, for plaintiff. *Johnston*, K.C. *McMaster* and *Keith*, for defendants.

Kelly, J.] [April 3.

ARMSTRONG CARTAGE CO. *v.* COUNTY OF PEEL.

(10 D.L.R. 169.)

Damages—Loss of profits as element of damage—Unreasonable delay in having repairs made—Highways—Liability of county for defective highway—Road taken over.

Where a chattel has been injured owing to a negligent act, the cost of repairing it, the difference in value between the

former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable, as damages, but damages are not recoverable for loss of the use of the chattel during the period of an unreasonable delay on the part of the owner in having the repairs made.

The "Greta Holme," [1897] A.C. 596, and *The "Argentino,"* 14 A.C. 519, referred to.

Where, under the Highway Improvement Act, 7 Edw. VII. (Ont.) ch. 16, as amended by 2 Geo. V. (Ont.) ch. 11, a county council has assumed highways in any municipality in the county in order to form or extend a system of county highways therein, the county is liable for the maintenance and repair of those roads, and for damages sustained by reason of the non-repair of any of them.

G. S. Kerr, K.C., and *G. C. Thomson,* for plaintiffs. *T. J. Blain,* and *D. O. Cameron,* for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [March 17.

GOLD MEDAL FURNITURE CO. *v.* STEPHENSON (No. 2).

(10 D.L.R. 1.)

Evidence—Husband and wife—Undue influence—Burden of proof—Liability of wife as surety—Independent advice—Change of position of parties—Guaranty—Wife as surety—Signing guaranty at husband's request.

In an action by a creditor of a limited liability company, upon a guarantee signed by a married woman, who was the secretary of, and a shareholder in the debtor company, the burden of proving undue influence in respect of her signature thereto obtained by her husband lies upon those who allege it.

Bank of Montreal v. *Stuart,* [1911] A.C. 120, followed; *Euclid Avenue Trust Co.* v. *Hohs,* 24 O.L.R. 447, referred to.

A creditor, without notice of any undue influence on the part of the husband in procuring his wife's signature to a security for the amount of an indebtedness due by a company of which the

wife was secretary and also a shareholder, given at the instance of the husband who was manager of the company, is not bound to see that she understood the document and had proper independent advice, particularly in a case where, in consideration of the delivery of the security, the creditor extended the time of credit to the debtor, advanced other goods and materially changed his position.

Gold Medal Furniture Co. v. *Stephenson* (No. 1), 7 D.L.R. 811, varied; *Chaplin* v. *Brammall,* [1908] 1 K.B. 233, doubted; *Bischoff's Trustees* v. *Frank,* 89 L.T. 188, and *Talbot* v. *Van Boris,* [1911] 1 K.B. 854, followed; *Turnbull* v. *Duval,* [1902] A.C. 429, distinguished.

In a transaction between a creditor and a limited liability company by which the indebtedness of the company was secured by a guaranty which was signed by a married woman at the request of her husband, the married woman cannot escape liability where it appears that she had a personal interest as the secretary and a shareholder in a company by pleading that she signed the guaranty at her husband's request without reading it over, where there was no misrepresentation and the creditor received it in good faith from the company as represented by the husband.

Bank of Montreal v. *Stuart,* [1911] A.C. 120, followed; *Chaplin* v. *Brammall,* [1908] 1 K.B. 233, doubted; *Gold Medal Furniture Co.* v. *Stephenson* (No. 1), 7 D.L.R. 811, varied.

D. H. Laird and *F. J. G. McArthur,* for plaintiffs. *C. P. Fullerton,* K.C., and *F. M. Burbidge,* for several defendants.

Province of British Columbia

COURT OF APPEAL.

REX *v.* CRAWFORD.

(10 D.L.R. 96.)

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [January 7.

Criminal law—Evidence — Demonstrative evidence — View by court—Magistrate—Summary trial by consent—"View" by magistrate.

A police magistrate sitting as such under Part 16 of the Criminal Code (1906), and summarily trying an indictable

offence, has no right during the trial to make a view of the land in respect of a transaction in which the charge of fraud was made which he was trying as such magistrate, at least where there is no consent of both the Crown and the accused to his so doing.

R. v. Petrie, 20 O.R. 317, applied.

Although s. 958 of the Criminal Code (1906) empowers the court to order that the jury on a criminal trial shall have a view of any place, person or thing, it is not to be inferred that a magistrate exercising a limited statutory power of summary trial without a jury in respect of certain indictable offences, may in like manner take a view of lands which are the subject matter of the offence charged.

D. W. F. McDonald, for defendant. *J. K. Kennedy,* for the magistrate.

ANNOTATION ON ABOVE CASE.

"Real evidence" is often produced at trials, when it is not exacted by any rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models, or by what is technically termed a "view" i.e., a personal inspection by some of the jury of the *locus in quo*,—a proceeding allowed in certain cases by the common law, in criminal as well as in civil cases, and much extended by the statutes, 4 Anne, ch. 16, sec. 8; Juries Act (Imp.) 1825), 6 Geo. 4, ch. 50, sec. 23; Common Law Procedure Act, 1852 (Imp.), 15 and 16 Vict. ch. 76, sec. 114, and Common Law Procedure Act, 1854 (Imp.), 17 and 18 Vict. ch. 125, sec. 58. Best on Evid. 11th ed., 195; *R.* v. *Martin*, L.R. 1 C.C.R. 378, 12 Cox C.C. 204, 41 L.J.M.C. 113. The application for the view may be made at any time before verdict. *Ibid.;* Bowen-Rowlands on Crim. Proceedings, 2nd ed., 252.

Section 958 of the Criminal Code of Canada, 1906, is as follows:—

"On the trial of any person for an offence against this Act, the Court may, if it appears expedient for the ends of justice, at any time after the jurors have been sworn to try the case and before they give their verdict, direct that the jury shall have a view of any place, thing or person, and shall give directions as to the manner in which, and the persons by whom, the place, thing or person, shall be shewn to such jurors, and may for that purpose adjourn the trial, and the costs occasioned thereby shall be in the discretion of the Court.

"(2) When such view is ordered, the Court shall give such directions as seem requisite for the purpose of preventing undue communication with such jurors: Provided that no breach of any such directions shall affect the validity of the proceedings."

Taking a view of the locality of the offence is receiving evidence, in a sense, and the prisoner's counsel should have the opportunity of attending: *R.* v. *Petrie* (1890), 20 O.R. 317, 324. In that case the prisoner was

indicted for feloniously displacing a railway switch and was tried by a Judge without a jury under the Speedy Trials Act. After hearing the evidence and the speeches of counsel the Judge reserved his decision, and before giving it he examined the switch in question, neither the prisoner nor any one on his behalf being present. The conviction was quashed, the Queen's Bench Division (Armour, C.J., Falconbridge and Street, JJ.) holding that even if the trial Judge had been warranted in law in taking the view, the manner of his taking it without the presence of the prisoner, or of any one on his behalf, was unwarranted.

That seems to have been all that was required for the decision of the case, but Armour, C.J., in delivering the opinion of the Court goes further and deals with the question of jurisdiction, and concludes that there was no authority in Ontario either at common law or by statute, to warrant a Judge trying a case without a jury in taking a view. He says:—

"It is clear that there is no statute authorizing the Judge to have a view in such a case, and we have to ascertain whether there is otherwise any authority in support of the right of a Judge to take such a view. If the Court had power at common law, an inherent power, to order a view by a jury in a trial for a criminal offence, it might well be argued that when the functions of the jury devolved upon the Court by statute, the Court became possessed of the power itself to take a view. The statute 4 Anne ch. 16, sec. 8, did not extend to criminal cases, and neither before it nor after it, until 6 Geo. IV. ch. 50, sec. 23, could a view be had in a criminal case without consent. (See 1 Burr. 253 in margin); In *Rex* v. *Redman*, 1 Kenyon 384, there was a motion for a view on behalf of the defendant, who stood indicted for a forcible entry. *Per* Curiam.—There can be no view in a criminal prosecution without consent, and the practice was so before the Act (4 Anne ch. 16). See *Anonymous*, 1 Barnard 144; 2 Barnard 214; 2 Chitty 422; *Commonwealth* v. *Knapp*, 9 Pickering, at p. 515, where it is doubted whether even with consent a view could be granted in a felony. There was no authority, in my opinion, for the learned Judge taking the view which he took in this case."

There is no authority for a magistrate trying a summary conviction matter, such as a charge of selling intoxicants to an Indian, to take a view of the *locus in quo* during an adjournment of the trial, as he himself stated in delivering his judgment finding the accused guilty; and where he did this *suo moto* and without notice to the parties or their counsel, it constitutes such an inherent defect in the course of legal procedure that the conviction is voided, even though the course taken by the magistrate was with the best intention: *Re Sing Kee* (1901), 5 Can. Cr. Cas. 86, 8 B.C.R. 20. The objection goes to the jurisdiction and may be given effect to notwithstanding a general statutory provision against the removal of convictions for such offences by certiorari, which would, however, not constitute a bar to certiorari for want of jurisdiction: *Ibid.*

The theory that a view was not permissible at common law is strongly controverted by modern text-writers. Wigmore on Evidence, sec. 1164, says:—

"The inconvenience of adjourning Court until a view can be had, or of

postponing the trial for the purpose, may suffice to overcome the advantages of a view, particularly when the nature of the issue or of the object to be viewed renders the view of small consequence. Accordingly, it is proper that the trial Court should have the right to grant or to refuse a view according to the requirements of the case in hand. In the earlier practice, the granting of a view seems to have become almost demandable as of course; but a sounder doctrine was introduced by the statute of Anne (which apparently only re-stated the correct common-law principle); so that the trial Court's discretion was given its proper control."

"That the Court is empowered to order such a view, in consequence of its ordinary common-law function, and irrespective of statutes conferring express power, is not only naturally to be inferred, but is clearly recognized in the precedents. Nor can any distinction here properly be taken as to criminal cases. It is true that here, by some singular scruple, a doubt has more than once been judicially expressed. But it is impossible to see why the Court's power to aid the investigation of truth in this manner should be restricted in criminal cases and the better precedents accept this doctrine." Wigmore on Evid., sec. 1163.

"Moreover, the process of view need not be applicable merely where land is to be observed; it is applicable to any kind of object, real or personal in nature, which must be visited in order to be properly understood. Thus at common law there need be no limitations of the above sorts upon the judicial power to order a view. The regulation of the subject by statute, which began in England some two centuries ago, was concerned rather with the details of the process than with the limits of the power. Statutes now regulate the process in almost every jurisdiction, but it may be assumed that the judicial power to order a view exists independently of any statutory phrases of limitation." Wigmore on Evid., sec. 1163.

In *Springer* v. *Chicago* (1891), 135 Ill. 553, 561, 26 N.E. 514, Craig, J., said:—"If the parties had the right upon the trial to prove by oral testimony the condition of the property at the time of the trial, . . . upon what principle can it be said the Court could not allow the jury in person to view the premises and thus ascertain the condition thereof for themselves? . . . If a plat or photograph of the premises would be proper evidence, why not allow the jury to look at the property itself, instead of a picture of the same? There may be cases where a trial Court should not grant a view of premises where it would be expensive or cause delay, or where a view would serve no useful purpose; but this affords no reason for a ruling that the power to order a view does not exist or should not be exercised in any case. . . . If at common law, independent of any English statute, the Court had the power to order a view by jury (as we think it plain the Court had such power) as we have adopted the common law in this state, our Courts have the same power."

Under sec. 11 of the Criminal Code, 1906 (Can.), the criminal law of England as it existed on the nineteenth day of November, one thousand eight hundred and fifty-eight, in so far as it has not been repealed by any Ordinance or Act, still having the force of law, of the colony of British Columbia, or the colony of Vancouver Island, passed before the union of

the said colonies, or of the colony of British Columbia, passed since such union, or by the Criminal Code or any other Act of the Parliament of Canada, and as altered, varied, modified, or affected by any such Ordinance or Act, shall be the criminal law of the province of British Columbia.

This makes it of importance to consider, as to the province of British Columbia, parts of the statutory law of England which having been enacted subsequently to the year 1792 in which the adoption of the English criminal law took effect in Ontario, were not material to the consideration of *R.* v. *Petrie* (1890), 20 O.R. 317.

The statute 4 Anne, ch. 16, in terms applied "in any action" at Westminster (which phrase would ordinarily not relate to a proceeding by indictment) and authorized the Court to order special writs commanding the selection of six out of the jurors therein named to whom the matters controverted should be shewn by two persons appointed by the Court.

Mansfield, L.J., stated the Rules for Views (1 Burr. 252) as follows: "Before the 4 & 5 Anne, ch. 16, sec. 8, there could be no view till after the cause had been brought on to trial. If the Court saw the question involved in obscurity, which might be cleared up by a view, the cause was put off, that the jurors might have a view before it came on to be tried again. The rule for a view proceeded upon the previous opinion of the Court or Judge at the trial, 'that the nature of the question made a view not only proper, but necessary,' for the Judges at the assizes were not to give way to the delay and expense of a view unless they saw that a case could not be understood without one. However, it often happened in fact that upon the desire of either party causes were put off for want of a view upon specious allegations from the nature of the question that a view was proper, without going into the proof so as to be able to judge whether the evidence might not be understood without it. This circuity occasioned delay and expense; to prevent which the 4 & 5 Anne, ch. 16, sec. 8, empowered the Courts at Westminster to grant a view in the first instance previous to the trial. Nothing can be plainer than the 4 & 5 Anne, ch. 16, sec. 8. The Courts are not bound to grant a view of course; the Act only says 'they may order it where it shall appear to them that it will be proper and necessary.' We are all clearly of opinion that the Act of Parliament meant a view should not be granted unless the Court was satisfied that it was proper and necessary. The abuse to which they are now perverted, makes this caution our indispensable duty; and, therefore, upon every motion for a view, we will hear both parties, and examine, upon all the circumstances which shall be laid before us on both sides, into the propriety and necessity of the motion; unless the party who applies will consent to and move it upon terms which shall prevent an unfair use being made of it, to the prejudice of the other side and the obstruction of justice."

An English statute, of 1825, 6 Geo. IV., ch. 50, secs. 23 and 24, provided that in any case civil or criminal wherever "it shall appear . . . that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in

order to their better understanding the evidence that may be given upon the trial," an order may appoint six or more, to be named by consent or, upon disagreement, by the sheriff, and the place in question shewn them by two persons appointed by the Court; and "those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn," and only so many added as are needed to make up twelve.

Chitty says: "In cases of indictments for nuisances, it may be necessary, either on behalf of the prosecutor, or of the defendant, for the jury to have a view of the premises indicted. This, it seems, cannot be granted by the Judges at the assizes, but if necessary may be the ground of removal by certiorari into the King's Bench. The power of granting a view, in criminal and civil cases, is now given, by the 6 Geo. 4 ch. 50, sec. 23, to the Court in which the issue is depending, or to a Judge in vacation. The Court will grant it on an indictment for not repairing a highway, or for a nuisance, but not on a prosecution for perjury, unless under particular circumstances. And a view will not be granted, if there is any risk of its misleading the jury. When it is allowed, the same rules will, in general, prevail, as are observable in civil proceedings." 1 Chitty's Criminal Law 483.

A later English statute, 15 & 16 Vict. ch. 76, sec. 114, made an order of a Judge for the view sufficient without the issue of a formal writ of view. A change of venue is authorized by the English Crown rule 45, if a view in another county is necessary: *Clerk* v. *R.*, 9 H.L.C. 184.

It has been held in England the Judge may adjourn the Court to enable the jury to have the view, even after the summing up; but the jury must not communicate with the witnesses during such view: *R.* v. *Martin* (1881), 12 Cox C.C. 204.

In *R.* v. *Whalley*, 2 C. & K. 376, it was held that a view could not be obtained at quarter sessions and an opinion was expressed that it was doubtful whether at assizes there could be a view except by consent. But the necessity for a view seems to be a sufficient ground for removal of the indictment into the King's Bench Division: *R.* v. *Justices of Tradgeley*, Sess. Cas. 180.

The County Court Judge's Criminal Court is a Court of record for all the purpose of the trial and proceedings connected therewith, or relating thereto: Cr. Code (1906), sec. 824. Its general jurisdiction is for the trial of offences which might be tried with a jury at the Courts of general sessions, or quarter sessions, in Ontario; Cr. Code (1906), ch. 825.

The Judge presiding at a County Court Judge's Criminal Court has in any case tried before him, the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried by a Court having jurisdiction to try the offence in the ordinary way and may render any verdict which might be rendered by a jury upon a trial at a sitting of any such Court. Cr. Code (1906), sec. 835.

But all of these statutory provisions fall short of making applicable

to such Court even *mutatis mutandis*, the statutory provision regarding a view by the jury contained in Cr. Code sec. 958, quoted supra. Furthermore, if there be any inherent common law jurisdiction pertaining to its quality or status as a Court of record which might authorize a view, it could hardly be held to be more extensive than the powers held by Courts of Assize and Courts of General and Quarter Sessions, and under the established English precedents the view could be taken only "upon consent:" *R.* v. *Redman*, 1 Kenyon, 384; *R.* v. *Whalley*, 2 C. & K. 376; *R.* v. *Justices of Tradgeley*, Sess. Cas. 180.

The trial of criminal cases without a jury is a modern device and no common law practice in regard thereto is available except in so far as the common law as to jury trials may be applicable.

Some of the American decisions as to the practice of granting views by the jury may be here noted:—When there is an inspection of the scene of guilt, it must be shewn what changes, if any, have taken place since the guilty act: *State* v. *Knapp*, 45 N.H. 148. In most jurisdictions the jury may be taken to view the premises: *Com.* v. *Webster*, 5 Cush. 298; *Chute* v. *State*, 19 Minn. 271; *Fleming* v. *State*, 11 Ind. 234; *Doud* v. *Guthrie*, 13 Ill. App. 659, but the visit must be in the presence of the accused: *State* v. *Bertin*, 24 La. Ann. 46. See *State* v. *Ah Lee*, 8 Or. 214. The view may be granted after the Judge has summed up the case: *Reg.* v. *Martin*, L.R. 1 C.C. 378, 41 L.J.M.C. N.S., 113, 26 L.T.N.S. 778, 12 Cox C.C. 204. If a part of the jury are allowed to go by themselves to the view this is error: *Ruloff* v. *People*, 18 N.Y. 179; Wharton's Crim. Evid. 10th ed., sec. 797, p. 1555.

If a view of the property has been given to the jury, the results of it may properly be regarded as part of the evidence in the case. Chamberlayne on Evidence, sec. 2172; *Shoemaker* v. *U.S.* (1893), 147 U.S. 282, 13 S. Ct. 361, 37 L. ed. 170; *Re Guilford* (1903), 85 N.Y. App. Div. 207; *Wead* v. *St. Johnsbury R. Co.* (1894), 66 Vt. 420, 29 Atl. 631; *State* v. *Fillpot*, 98 Pac. Rep. 659, 51 Wash. 223.

Allowing the jury to view the place where the alleged crime was committed, or where some fact or transaction material thereto occurred, being discretionary with the Court, where the premises have been thoroughly described in the evidence, it is not error to refuse defendant to have the jury take the view. This rule applies to capital cases, but in any case if the view is likely to mislead the jury it should be denied. 12 Cyc. 537.

The cases are divided upon the question whether the purpose of the view is to furnish new evidence or to enable the jurors to comprehend more clearly, by the aid of visible objects, the evidence already received. The latter proposition is well sustained and seems more consistent with the conservative theories on which the rules of procedure and jury trials are based, but the contrary theory, holding that the purpose of a view is to supply evidence, is supported by good authorities. 12 Cyc. 537.

The enlargement of the rights of Judges and magistrates sitting without a jury as regards the taking a view of the *locus* seems to be one which calls for legislative action.

Bench and Bar.

Lord Macnaghten's Successor.

Sir Robert John Parker, one of the justices of the Chancery Division of the English High Court, succeeds the late Lord Macnaghten as Lord of Appeal in Ordinary, taking the title of Lord Parker of Warrington. Lord Parker's elevation is unprecedented, no other puisne judge having become a Lord of Appeal without first serving as a Lord Justice. As a Chancery judge he had occasion to deal with many patent cases and he is skilled in that branch of the law, and the *Law Journal* speaks highly of "his fine judicial spirit, his strong inclination to disregard mere technicality, and his urbane air of scholarship." Mr. Justice Sargant receives the vacant place in the Chancery Division.—Ex.

Reason for Judicial Patience.

An exchange, speaking of a learned and well known Chief Justice of Ontario, says that he is sometimes a rather arbitrary and curt ruler of the court. "On a recent occasion a prominent member of the Bar was presenting his argument to the learned judge and was proceeding to elaborate on a certain point of law which he thought had an important bearing on the issue. But the judge thought otherwise. He was impatient. For a while he listened to the lawyer's argument, then he leaned back with an air of boredom, and interrupted with: 'Mr. ———, it seems to me that this is not relevant. What reason is there why I should be compelled to listen to all this?' The counsel's mouth had just a suspicion of a smile round its corners as he answered: 'Reason, my lord—why, $8,000 per year.'"

Lord Gorell.

John Gorell Barnes (who died recently at Mentone of an attack of influenza) was born in May, 1848, and was the son of Mr. Henry Barnes, a ship-owner, of Liverpool. He went to Peterhouse, Cambridge, and took his degree in mathematical honours in 1868, when he was barely twenty. Entering the Inner Temple, he became a pupil of the late Lord Justice Matthew, and was

called to the Bar in Hilary Term, 1876, taking silk in 1888. Upon Sir Francis Jeune's promotion to the Presidency of the Probate Division, caused by the death of Sir Charles Butt, Mr. Barnes was in 1892 raised to the Bench, and upon the death of Sir Francis Jeune, in 1905, he became president of the Probate Division, from time to time sitting in the Court of Appeal. In 1909 he was raised to the peerage as Baron Gorell of Brampton. He presided over the committee which considered the Naval Prize Bill and over the committee on County Court Procedure and the Divorce Royal Commission, and in 1909 he was an active member of the Committee on Stage Plays. He is succeeded by the Hon. Henry Gorell Barnes.—*Law Times.*

Flotsam and Jetsam

NEGLIGENCE—INNKEEPER—DUTY TO INTOXICATED GUEST.—An intoxicated guest fell from a hotel porch and subsequently died of exposure. The innkeeper, who, after discovering his situation, but not his injury, allowed him to remain there, was held not liable, the act being mere nonfeasance. *Scholl* v. *Belcher*, 127 Pac. Rep. 968 (Ore., 1912).

It is the duty of an innkeeper to take reasonable care of his guests. *Scott* v. *Churchill*, 15 Misc. 80 (N. Y., 1895); *Sandys* v. *Florence*, 47 L.J.C.P. 598 (1878); *West* v. *Thomas*, 97 Ala. 622 (1892); *Omaha Hotel Ass.* v. *Walters*, 23 Neb. 280 (1888). He is not, however, an insurer. *Weeks* v. *McNulty*, 101 Tenn. 495 (1898); *Clancy* v. *Barker*, 131 Fed. 161 (1904); *Sheffer* v. *Willoughby*, 163 Ill. 518 (1896). So if a defect in the premises is obvious the guest must use reasonable care. *Smeed* v. *Morehead*, 70 Miss. 690 (1893); *Bremer* v. *Pleiss*, 121 Wis. 61 (1904); *Ten Broek* v. *Wells*, 47 Fed. 690 (1891).

Drunkenness does not relieve a man from the same degree of care required of a sober man. *Fisher* v. *R. R.*, 39 W. Va. 366 (1894); *Welty* v. *R. R.*, 105 Ind. 55 (1885); *Rollestone* v. *Cassirer*, 3 Ga. App. 161 (1907); *Keeshan* v. *Elgin Tract Co.*, 229 Ill. 533 (1907). A carrier is not bound to care for a drunken passenger. *Statham* v. *R. R.*, 42 Miss. 607 (1869); *R. R.* v. *Woodward*, 41 Md. 268 (1874). But is bound to do nothing which, in view of his helpless condition will expose him to unnecessary danger. *Weber* v. *R. R.*, 33 Kan. 543 (1885); *Wheeler* v. *R. R.*, 70 N.H. 607 (1900); *Black* v. *R. R.*, 193 Mass. 448 (1906); *R. R.* v. *Marrs*, 119 Ky. 954 (1905).

SPECIFIC PERFORMANCE—SALE OF LAND—EFFECT OF FIRE—On a bill for specific performance of a contract for sale of real estate, where fire destroyed the buildings before the execution of the deed or payment of balance of purchase money, it was held that the vendor could not obtain specific performance and the loss must fall upon the vendor. *Good* v. *Jarrard*, 76 S.E. Rep. 698 (S.C., 1912).

The doctrine of the principal case, that the vendor must bear the loss by fire or other accident happening between the making of the contract and its completion, is contra to the weight of authority and is followed directly in but five other state courts: *Cutliff* v. *McAnally*, 88 Ala. 507 (1889); *Gould* v. *Murch*, 70 Me. 288 (1879); *Thompson* v. *Gould*, 20 Pick. 134 (Mass., 1838); *Wilson* v. *Clark*, 60 N.H. 352 (1880); *Powell* v. *Dayton Co.*, 12 Ore. 488 (1885). The question is expressly left open in *Wetzler* v. *Duffy*, 78 Wis. 170 (1890). The New York courts seem to favour the rule in the principal case in their later decisions, *Smith* v. *McCluskey*, 45 Barb. 610 (1866); *Goldman* v. *Rosenberg*, 116 N.Y. 78 (1899); *Listman* v. *Hickey*, 65 Hun. 8 (1892); but in *Listman* v. *Hickey*, supra, which on its facts is more nearly like the principal case, Paterson, J., based his opinion upon the fact that the contract in question was for both real and personal property and was entire; he distinctly recognised the general rule to be that of *Paine* v *Meller*, infra, but distinguished this case from it on grounds given above.

The rule followed in the majority of jurisdictions (contra to the principal case) that the loss falls upon the vendee, was first laid down in *Paine* v. *Meller*, 6 Vesey, 349 (Eng., 1801), and has been followed repeatedly in this country: *Willis* v. *Wozencraft*, 22 Cal. 607 (1863); *Sherman* v. *Loehr*, 57 Ill. 509 (1871); *Cottingham* v. *Fireman's Co.*, 90 Ky. 439 (1890); *Skinner* v. *Houghton*, 92 Md. 68 (1900); *Walker* v. *Owen*, 79 Mo. 563 (1883); *Franklin Co.* v. *Martin*, 40 N.J.L. 568 (1878); *Gilbert* v. *Port*, 28 Ohio 276 (1876); *Dunn* v. *Yakish*, 10 Okl. 388 (1900); *Elliott* v. *Ashland Co.*, 117 Pa. 548 (1888); *Brakhage* v. *Tracy*, 13 S.D. 343 (1900).

If the vendor agrees expressly to deliver possession of premises in the same condition in which they were at the time of the bargain, he must, obviously, bear the loss resulting from fire or other accident. *Marks* v. *Tichenor*, 85 Ky. 536 (1887). It is equally clear that a person, whether he be the vendor or vendee, must be answerable for any loss due to his own negligence. *Mackey* v. *Bowles*, 98 Ga. 730 (1896).

A PROVINCIAL SCOT:—How little the change that has come over the legal profession in Scotland may be divined from the following characterization of Lord Cockburn, from an article by W. G. Scott-Moncrief in the *Judicial Review*:—"Cockburn was a Scotsman of a type which no longer exists. In his rank of life, through constant intercourse with the greater world of England, not to speak of the Continent, men have necessarily become much more cosmopolitan than they were in days when the only link between the Edinburgh Courts and parliamentary life in London was the Lord Advocate for the time being, who travelled between the two cities in coaches, public or private, and made the weary journey, we may well suppose, as seldom as possible. Cockburn could hardly have conceived the day when quite a body of advocates would spend their nights in sleeping carriages, and divide their business hours between Edinburgh and Westminster; nor could he have imagined that the time would come when a greater judicial prize than the Lord Presidentship would attract the ambition of Scottish legal talent. He does not seem to have had that educational connection with the Continent which our older generation of lawyers enjoyed. There is no evidence that he ever crossed the Channel.

THE HABIT OF WORDY ARGUMENT:—More than one judge of late has attributed the increasing length of trials to the growing habit of repetition at the Bar. It is not a new complaint. "He was careful to keep down repetition to which the counsel, one after another are very propense; and, in speaking to the jury on the same matter over and over again, the waste of time would be so great that, if the judge gave way to it, there would scarce be an end, for most of the talk was not so much for the causes as for their own sakes, to get credit in the county for notable talkers"——thus it is written in the biography of Lord Chief Justice North. A certain amount of repetition (says the *Globe*) is, of course, necessary for emphasis, to say nothing of comprehension. Lord Parker, in a humorous speech he made at a law students' dinner a day or two before his elevation to the House of Lords, remarked that when he was at the Bar he made it a practice to repeat each argument at least twice. And the new Lord of Appeal's practice never required him to address a jury! —*The Law Journal.*

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FOUND MONEY—IS IT CAPITAL OR INCOME?

The name of this article was suggested to me by a bank manager. Having adopted his designation, more for convenience than anything else, I will in the first place define, or rather illustrate, its meaning.

Let us suppose A. to be the owner of one hundred shares in a company, either a bank or other private corporation. The company, through its directorate, or otherwise, adds to its capital by increasing the number of its shares by one-fifth: so that for every one hundred shares there will be an increase of twenty new shares. These new shares are offered by the company to the registered shareholders at a certain price, usually or always, a price below the market value. A. being the owner of one hundred shares is entitled to twenty new shares. He is not bound to accept them or any of them. He may accept them, and if he pays for them he becomes the owner. Let us now suppose that the original par value of each share was one hundred dollars, that the market value of each share is now one hundred and fifty dollars, and the company offers its new shares for one hundred and forty dollars each, thus allotting to A. twenty new shares, or rather the right to purchase twenty new shares at the price stated. A. finds a purchaser for his twenty new shares, who pays him ten dollars a share for his rights in these twenty new shares. A. transfers these rights to the purchaser, receives two hundred dollars, and if no one is interested in the transaction but himself, puts the money in his pocket, and it matters not whether he puts it in the *income* or *capital* pocket. The above will shew what I mean by the words "found money."

Now, let us suppose that A. instead of being possessed of these shares in his own name and for his own personal use and

benefit, holds them as a trustee for others, and that it is in the interest of one or more of the cestues que trust that this "found money" should be considered as income, and in the interest of others that it be considered as capital. Now, the trustee must decide which pocket he will put it in. Let us, in order to be more easily understood, suppose one of the cestues que trust to be the widow of the testator who has the interest of a life tenant, and the other a child or children, who have the interest of a remainderman. Let us then look squarely at the question, and answer it if we can, and tell the trustee to whom he shall pay the found money, whether to the widow as tenant for life, or to the children having the interest in remainder. If the money belongs to income it goes to the widow; if it belongs to capital it goes to the children.

I may as well at this point state that the decisions in the United States, and there are many of them directly on the point, preponderate in favour of capital, and this preponderance is not confined to the courts of many of the individual States, but is found in the decisions of the Federal Courts, including the Supreme Court of the United States.

Cook on Corporations, 6th ed., sec. 559, expresses with sufficient clearness the trend of American decisions on this subject in the words following: "The right to subscribe for new shares at par upon an increase of the capital stock, which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such increment must be treated as capital, and be added to the trust fund for the remainderman. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust, or sells the right to subscribe for a valuable consideration. In either event the increase goes to the corpus." And again, in the same section 559, Cook states what he believes to be the law in his country in the following succinct language: "Where new stock is issued and the *right to subscribe* therefor is sold, the proceeds of such sale belong to the remainderman and not to the life tenant." If this were the law in Canada or in England (except by statute), we would not need to make

further enquiry. My contention, however, is that this is not the law either in Canada or in England, and Cook does not hold otherwise, but clearly defines the English law on the subject in section 557 of his work, when he quotes from a recent English decision as follows: "An English Court has recently said: 'The true rule to be inferred from the cases as between tenant for life and remainderman, seems to me to be that the tenant for life is entitled to all payments out of profits made by the company, unless they have been validly capitalized by the company by resolution or otherwise,' *Re Piercy* (1906), 95 L.T. Rep. 868." I venture to say that there is no English decision that contravenes in the slightest degree the decision in the *Piercy* case, and that the dictum of Mr. Justice Neville, above quoted, is good law in Canada to-day. At this point I may refer to and discuss the celebrated case of *Bouch* v. *Sproule*, 57 L.T. Rep. 345, 12 App. Cas. 385, which has so often been invoked on behalf of remainderman and capital, and which was relied upon in the *Piercy* case, but without success, because the two cases were not only not parallel, but had no similarity so far as concerned the essential points.

The *Bouch* case came first before a single judge, Mr. Justice Kay, and was decided by him in favour of capital. It then went to the Court of Appeal consisting of three Lord Justices, and was there decided in favour of income. Thence it was taken to the House of Lords consisting of four Lords of Appeal and was there decided in favour of capital, reversing the decision of the Court of Appeal, and upholding that of Mr. Justice Kay. I need hardly say that in a like case the decision in *Re Bouch* must govern throughout the British Dominions, unless it were affected by statute; and if the law and the facts in that case were paralleled by the law and the facts in the case of "found money," the question would be settled beyond dispute in favour of capital as relating to the latter. I now propose to review this celebrated case, which has so often been quoted and so much relied on; and to shew that it has no similarity to, and no bearing upon, the matter in hand.

The disputed money in the *Bouch* case was claimed by two different interests, one of which contended that it was capital, the other that it was income. I cannot do better than to quote, at this point, the words of Lord Herschell in his reasons for judgment. "William Bouch, who died on the 19th of January, 1876, by his will bequeathed all the residue of his personal estate to Sir Thomas Bouch upon trust to convert the same into money, or with the consent of Jane Bouch (the testator's wife), to allow the same to remain unconverted; and upon further trust to permit his said wife to receive the interest, dividends, and annual income of said personal estate during her life; and subject thereto, he bequeathed the residue of his personal estate to Sir Thomas Bouch absolutely. Part of the residuary personal estate of William Bouch consisted of 600 shares of ten pounds each in the Consett Iron Co., upon which £7 10s. per share had been paid."

Let it be borne in mind that the original price, or par value of each share was just £7 10s. The company, as they were legally entitled to do, decided to increase, and did increase the number of shares by one third, by which transaction the Bouch estate was now entitled to become the holder of 800 shares, 200 of them being the newly allotted shares. Let me digress just now for a moment from the immediate history of the transactions, while I refer to the value of the shares previous to and subsequent to the increase above mentioned. Lord Watson in his reasons for judgment, 12 A.C. at page 404, says: "Before the proposal to issue new shares was made, the old shares were selling at a premium of £21 per share, but after the allotment of new shares the premium fell to £14," and he goes on to say: "If the company had offered to its members a choice between the bonus dividend and new shares with £7 10s. paid on each no sane shareholder would have elected to take the dividend." This "dividend" *so called* was the money in dispute. Let us figure this out a little more thoroughly. The original par value of each share was, as I have stated, £7 10s. Adding the premium in each case as mentioned above by Lord Watson and it will be seen

that the value of a share before the allotment was £28 10s., and after the allotment was £21 10s. So that before the allotment the Bouch estate owned 600 shares worth £28 10s. each, equal to £17,100; and after the allotment it owned 800 shares worth £21 10s. each, equal to £17,200. This comparatively trifling difference of £100 between the old value and the new is scarcely worth considering. It might be accounted for by the fluctuation of the money market, by the introduction of fractions of shares where the number was not a multiple of 3 or from the fact that the exact figures were not considered necessary. However this may be it plainly appears that the value of the stock owned by the *Bouch* estate was practically the same before and after the new shares were created. I hardly need to add that the same principle would apply to all other shareholders unless they were *insane*, as Lord Watson says "no *sane* shareholder would have elected to take the dividend." In other words, no stockholder in his right mind would sell or dispose of to the company, or to any one else for £7 10s. a share, when he could get £21 10s. for that share by going around the corner and offering it to a money-broker. Now let us return to the history of the case, and it can be very briefly concluded. Stripped of all unnecessary verbiage it may be correctly stated thus. The company after having allotted the new shares (now worth £21 10s. per share, according to both Lord Herschell, page 391, and Lord Watson, page 404), offered to pay the shareholder £7 10s. per share therefor. That is to say, they would give him £7 10s. for £21 10s. The offer was more than absurd. It was ludicrous. When understood, no wonder Lord Watson said "no sane man would accept it," and I think one is justified in coming to the conclusion that no sane man did accept it, and unless there were lunatics in the Consett Co. not one shareholder accepted the flim-flam offer of one dollar for that which was worth a fraction less than three dollars, for that was what the offer of the company to its shareholders amounted to.

Let us follow the history of the case a little further. After this wonderful scheme was matured the registrar of the com-

pany sent what was called a "bonus dividend warrant" to each shareholder asking him to "be good enough to sign and return the same when the amount will be applied in payment of £7 10s. per share on your above named new shares." The "bonus dividend warrant" was, of course, returned. The shareholder, the Bouch estate, was now the owner of 800 shares worth £21 each and amounting to £17,200, in lieu of the 600 shares which it held a few days before, worth £28 10s. each, amounting to £17,100. The result was nothing more nor less than a watering of the stock, to the extent of one-third minus a fraction. Nobody made any money. There was no "found money." No one was richer or poorer. The property was more bulky, but not a penny more valuable. When you add a gallon of water to three gallons of wine you have a larger quantity of liquid, and may make a bigger show; but you have no more wine than you had at first.

I have referred at length to the *Bouch* decision because it has been so much relied on in relation to "found money," and I am more than surprised to find that any one should consider it to be an authority in a case of "found money." To my mind after studying the decision carefully I cannot see that it has the slightest relation to or bearing upon the matter now under consideration. If any one differs from me in this regard I trust that he will look into the *Bouch* case with exhaustive care, and not merely glance at it, as those seem to have done, who in my humble opinion have misapplied it. There may be other English decisions which have been misunderstood and misapplied in support of the view that "found money" is capital not income, but a thorough analysis of them will shew that they, like the *Bouch* case, are inapplicable and valueless in support of that view.

Now, I will revert to the *Piercy* case above mentioned, which as I have already said correctly states the English law and, therefore, the law in Canada on this subject, and which has not been and is not contravened, or in any way affected or weakened by the *Bouch* case or any other English decision. It is, therefore, good law to-day. This is my first premise. Let us then see if the dictum of Mr. Justice Neville applies to "found money."

Let us enquire, first of all, whether or not this money is a "payment out of profits made by the Company," and, secondly, whether or not it has "been validly capitalized by the company by resolution or otherwise." Let us look carefully at my definition at the beginning of this article and discover, if we can, where this "found money" has its origin, then follow it into the shareholder's pocket. By its allotment a company offers a new share for one hundred and forty dollars which is worth one hundred and fifty dollars. In other words, it offers the shareholder a bonus of ten dollars. This ten dollars to the shareholder is "found money," as soon as he can procure a purchaser. He goes to his broker, conveys to him the right to purchase the new share, the broker accepts the right, pays $140 to the company for the new share, obtains the new share in his own name, and pays ten dollars to the shareholder. Where does the ten dollars come from? It comes out of the company and is a payment by the company when it conveys to the broker a share in the company for ten dollars less than its value, that is to say, a share for $140 which is worth $150. It is hardly necessary to say that it comes out of the "profits made by the company," as all payments, whether in the shape of dividends or bonus or otherwise, are of necessity payment out of profits of the company. They cannot be paid from any other source unless they are misappropriated from capital. In the second place let us make the more important enquiry as to whether or not this ten dollars has been validly capitalized by the company. It has found its way into the shareholder's pocket and its history is concluded, so far as it relates to this discussion. The company has paid it indirectly, it may be said, but paid it all the same. It never receives it back. It never finds its way again into the exchequer of the company and has never been capitalized. It is like the ripe fruit that falls from the tree. It grows out of and comes from the tree. It never goes back to the tree. It never becomes capitalized. Let me emphasize here a most significant fact that in the *Bouch* case, and in every other English case dealing with the question of capital and income, whenever and wherever the disputed money was

declared to be capital this disputed money when it left the hands of the company was paid out of profits made by the company and was returned to, and validly capitalized by the company.

The decision in *Re Armitage* (1893), Chan. Div., vol. 3, page 337, does not in the least contravene the principle that I have just stated. There the disputed money was the difference between £9 5s. 6½d. and £8 and this difference £1 5s. 6½d. per share was claimed both by the remainderman and by the tenant for life. The court decided that it was capital and belonged to the remainderman. Mr. Justice Lopes, at page 347, says: "It is admitted that if these shares had been sold by the executors for £9 5s. 6½d. per share before this sale *en masse* of all the shares of the new company, the excess of £1 5s. 6½d. per share would have been regarded as capital and would not have gone to the tenant for life." This being *admitted* the case for the life tenant, of course, fell to the ground, on the well known principle that the whole includes all its parts.

I beg to refer briefly to the only Canadian case that I have been able to find on this important question. It is in *Re Estate of Jairus Hart,* vol. 5, Eastern Law Reporter, page 93, in which the learned Chief Justice of Nova Scotia has decided that what I have designated "found money" was capital and not income. In arriving at a decision in this case the Chief Justice seems to have relied upon Cook on Corporations and the two English decisions that I have herein discussed. How he could find any support for his decision in the two English cases mentioned or in any other English case I am at a loss to know. The opinion of a jurist so learned in the law, and of such broad legal experience is entitled to great respect; but I cannot but differ from him after studying the authorities with all the care and research that I can give to the subject.

At the close of his reasons for judgment the Chief Justice says: "The rights of parties in cases of this kind have always been regarded as a difficult question, and in deciding in favour of the remainder interest, I do not feel all the confidence I could wish to have on such an important point." I am not surprised at the learned Chief Justice's "want of confidence."

An upright judge and an honest lawyer should always experience a lack of *confidence* when they come to an erroneous conclusion. I sincerely hope that the question at issue may come before the highest tribunal in the land and that at some early date we may have a decision upon the point, which will govern us in Canada, and set the matter at rest. If and when that decision comes, I believe, and feel with all the *confidence* which the Chief Justice of Nova Scotia did not feel, that it will confirm the opinion which I have arrived at and endeavoured to establish, namely, that "found money" is not capital belonging to the remainderman; but is income and belongs to the tenant for life.

Ottawa. H. H. BLIGH.

THE OPEN COURT.

An important decision has just been given in England by the House of Lords on the subject of trials in camerâ. Their Lordships held in the case of *Scott* v. *Scott,* that "Courts of justice have no power to hear cases in camerâ, even by consent, except in special cases in which a hearing in open court might defeat the ends of justice; and in any case an order for a hearing in camerâ extends only to the hearing, and it is not a contempt of court to publish the facts subsequently, if it is done bonâ fide and without malice; and such publication is not a criminal cause or matter in which no appeal lies under sec. 47 of the Judicature Act, 1873. The rule as to hearing in open court does not apply to the jurisdiction of the Court of Chancery over wards and lunatics, nor to cases affecting property not status in which the parties agree to go before a judge in camerâ as arbitrator."

In commenting upon this judgment the *Law Times* uses the following language: "On the first, and perhaps the most important point, once and for all the House of Lords has demolished the idea that any judge has a right to conduct proceedings in private, save where justice could not be done at all if it had to be done in public—as in the case of a secret process—or

where, to use the words of Lord Haldane, "in the two cases of wards of court and of lunatics, where the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction." These are the only apparent exceptions to the broad and excellent principle that the courts of this country must, as between parties, administer justice in public, and this principle has been well enunciated by Lord Justice Fletcher Moulton (as he then was) in the Court of Appeal and by Lord Shaw in the House of Lords in the present case. The former said: "The courts are the guardians of the liberty of the public, and they must be doubly vigilant against all encroachments on that liberty by the courts themselves. The judges are not the tribunal to decide on the proper limitations of public rights. . . . Nothing would be more detrimental to the administration of justice in the country than to intrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy." Lord Shaw said: "I will venture to enter my respectful protest against the assumption of any general power by the present English courts of law . . . to hold any courts of justice with closed doors," and, again, with reference to the order to hear in camerâ and the attempted suppression of the report: "They appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties and an attack upon the very foundations of public and private security." And he concluded:—

"I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments (first declaring that the cause should be heard in camerâ, and, secondly, finding Mrs. Scott guilty of contempt) were to stand, then an easy way would be open for judges to remove their proceedings from the light and to silence for ever the voice of the critic and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country,

and I do not think it has any warrant in our law. Had this occurred in France I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of lettres de cachet had returned."

Strong words, but expressions of opinion which will be generally approved.

The same writer in speaking on another matter closely allied with the proposition in *Scott* v. *Scott*, expresses the hope that no extension of trials in camerâ in criminal cases will be admitted. He says, "Our view is that the interests of justice are best served by legal proceedings in all courts being conducted in open court. Clearly the general publication of indecent details should be sternly suppressed, and power might well be given to exclude persons of tender years on the hearing of cases dealing with matters contrary to decency or morality. A full public hearing ensures the proper administration of justice."

SOVEREIGNTY OVER THE AIR.

Sir H. Erle Richards's public lecture on "Sovereignty over the Air" (Oxford, Clarendon Press, 27 pp., 1s. 6d.) is an opportune exposition of what may fairly be called the Common Law point of view. Continental jurists for the most part (not all, for Prof. Zitelmann at any rate goes with us, see the note ad fin.) assume that there is some objection in principle to allowing territorial sovereignty to extend upwards. They postulate an analogy between the air and the high seas which, as our learned colleague rightly notes, might be correct if the bottom of the sea were inhabited. At the same time, they contradict the analogy of municipal law, so far as existing and applicable. Sir H. Erle Richards's points are, in summary abridgment, as follows:

International law gives no support to the doctrine of "free air." States have exactly the same ground—namely, self-protection—for claiming sovereignty over the superjacent air as for claiming it over adjacent territorial waters. Nor can any

limitation analogous to the range of guns, actual or conventional, be applied; for the mischief of bodies falling by accident or design from an airship (not to speak of a whole wreck) only increases with the height from which they drop. Military dangers, too, are obvious. And "in fact, States have always exercosed sovereignty over the air so far as they have wanted to do so."

As to municipal law, dominion "usque ad caelum" is recognized by the better opinion here, and by the law of most countries, though sometimes with a restriction on the annexed remedial rights determined by the limit of effective occupation or substantial interest. Where an individual owner's rights are, there must also the public sovereignty of his State be. Then, if the air is free, why is it not free at a hundred feet above ground, or ten, or five? And what about freedom to land?

The most plausible counter-suggestion is sovereignty limited by a right of innocent passage. It might be expedient to establish such a right by convention; but in fact the law of nations does not recognize any corresponding positive right on land. Then there is the proposal of limiting State control over aerial navigation to a vertical zone of say 1,500 metres. But "it seems impossible to draw any real distinction between different zones of air space"; we may add that nobody knows what the limits of aerial navigation will ultimately be.

Further, and this appears to be a fatal objection, the doctrine of "free air" would allow belligerent air-vessels to fly at will over the territory of neutral States. Even aerial warfare above neutral ground could be forbidden only by special convention. In fact, the "free air" theory will not work without exceptions of such extent as to make the rule absurd, and it is simpler to admit State sovereignty at once.—*Law Quarterly.*

THE COURTS OF ONTARIO.

We must often look abroad to understand ourselves, and "see oursels as ithers see us"—at least to know the value, comparatively, of our own institutions and the faults or benefits of administration. The observations we quote below are made by one very competent to form an opinion on the subject, and especially as a large sum of money was devoted by a patriotic American to obtaining information as to the best modes of administering justice in his country and the most desirable forums for that purpose, and this Mr. Harley, a lawyer of eminence, was selected to make enquiries on the subject, and report thereon. We do not perhaps appreciate how much we in the English-speaking provinces of the Dominion have to be thankful for in connection with this most important subject. A perusal of the whole paper, which we regret not having space for in full, would make this fact abundantly apparent.

In this excellent paper read by Mr. Herbert Harley at the annual meeting of the Illinois State Bar Association held last month at Springfield, Ill., he spoke of the administration of justice in the Courts of Ontario. The following extract will be read with interest by members of the Ontario Bar, and gives a good idea of the adaptability and flexibility of the system adopted in the English-speaking Provinces of the Dominion, for speaking generally the procedure is much the same in all of them when administered by a judge who is familiar with its scope and has the intelligence and the nerve to use the power given him. We quote as follows:—

"But Ontario is not remote from Illinois, either geographically or socially. When England acquired Canada Ontario was unsettled. Its immigrants were English, Scotch and Irish, and they planted there the English common law while Quebec retained the civil law of its French habitants. There has been more recently in Ontario a sprinkling of German, Scandinavian and Italian immigrants, so that to-day the people are racially identical with those of the typical northern state of the Amer-

ican Union. They have the same climate, the same resources, the same industries, the same substantive law, the same customs, literature and traditions as the people of the northern states. The unities of social and political and industrial life on both sides of the Niagara river are everywhere apparent. The differences are hard to detect, except in this field of the administration of law.

It has been suggested that Ontario's success lies in the fact that it is of a homogeneous nature and not subject to the stresses of a swift evolution. This is hardly true. On her frontier Ontario has always had the rough and ready types that are found in the lumber camps. In recent years Ontario has developed a great mining field and has done it without letting down the bars of civilization. Her railroad and manufacturing development has been swift and her mines have swelled litigation. Her capital city has had a growth hardly rivalled on this continent during the past decade. Toronto is to-day a boom city of nearly 400,000 people. Building lots five miles from her city hall are held as high as property five miles from the Chicago postoffice. Platted lots ten miles from the centre are probably bringing a higher price than lots the same distance from the Chicago loop. And in this typical Canadian province there is one standard of justice applying with mathematical equality to the labourer who sues for a single day's wages and the trust company which brings suit for a million dollars.

Now before we come to the painful comparison of Illinois and Ontario justice let us consider the machinery of Ontario's department of justice. First the bar. Except in point of organization and some mere external peculiarities the bar is the same as in Illinois. The terms barrister and solicitor are retained, but practically every solicitor is also a barrister. And barristers are free to form partnerships, to accept annual retainers and to refuse any retainer. They wear gowns in court, and there is the honorary rank of King's Counsel with the privilege of a silk gown, but for all practical purposes the bar of Ontario is very nearly like that of Illinois and very far from that of England.

Its real difference from the Illinois bar lies in its organisation. When a young man is admitted to the bar in Ontario he is admitted by the bar after having taken the course of study prescribed by the bar. He is then presented to the court and signs the roll. This is a formality. He is accountable directly to the bar and the bar is directly responsible for his conduct.

The better element of the Ontario bar, with public opinion and the courts back of it, controls absolutely the conduct of every Ontario lawyer. You know that this is at the very heart of the matter. The Illinois Bar Association includes less than one-fourth of the practising lawyers of the state. As a means for governing the bar, or of even exerting any considerable influence, it is impotent. Here lawyers are in theory responsible to the courts. But by virtue of your political traditions and the dependence of your judges, the court is in reality responsible to the bar. The very lawyers whom you would like to disbar for professional and patriotic reasons, if they play their cards cleverly, can exert a greater influence upon judges than the high-minded and responsible lawyers enrolled in your association. The Ontario bar is a responsible, self-governing body. The Illinois bar is a privileged class practically without responsibility and without the means for governing itself.

One of the things that we most need on this side of the line is self-government by the bar. It can come through thorough organisation first and autonomous authority by statutory delegation second.

Of course Canada had the immeasurable advantage of profiting by the mistakes, the excesses of transcendental theory, which have characterised our political structure. In England and all her dependencies, during the development of the democratic ideal, office has been considered a means to an end. With us office came to be a plum for every patriot to hustle for. In Canada office has always been assumed to be public service rather than a personal perquisite. And it has been steadfastly held that the public servant deserves adequate compensation both in rate of salary and in tenure of office.

In the past generation or two the American bar has undergone a significant change. The judicial office has suffered from encroachments but private practice has become more and more lucrative. The bar has in a measure divided between those who could afford to accept the uncertainties of the judicial position and those who scorn public service. In Ontario judicial tenure is for life and the salary is such that practically no lawyer in the Province could afford, from a mere pecuniary standpoint, to refuse to commute his probable earnings at the bar for a life salary of $8,000 on the bench of the High Court of Justice. Even county judges are paid more than the justices of supreme courts in certain American states in which perverted democratic ideals have been most rampant.

The one central feature of the Ontario judicial establishment by which we can profit most readily is its unification. It was not always so. Of course Ontario never went as far as England, where at one time there were four score separate courts, and it was easy and natural to copy England's great unification of 1873. The change reached Ontario in 1881 when her various tribunals were amalgamated in the Supreme Court of Judicature. This court has the fullest jurisdiction, both as to trials and appeals.

When one comes to think of it he realises that the sole purpose of advocacy is to see that no fact and no point of law is overlooked. It should be the court's prerogative to see that neither side oversteps ethical boundaries. Judges who have nothing to fear from counsel or clients do this unfailingly. The thing which will most strike you as peculiar when you attend your first trial in Ontario is the utter informality in examining witnesses. Let me quote Mr. Justice Riddell who said the following to the New York Bar Association in 1912:—

"We do not have much bother about admission or rejection of evidence in our courts; unless we can see that the exclusion of evidence or the admission of evidence has led to some injustice, then we pass it by. Matters of law as a rule are the determining factors in the appellate court; although there are occa-

sionally cases in which appeals succeed upon the ground of the non-admission of evidence or the admission of evidence which ought not to have been admitted. If a case is tried before a judge, and he has improperly admitted evidence—and I may say that that is the rarest of all contingencies, because as a rule we admit the evidence subject to objection, and then we never allow it to influence our minds, of course—if a judge has refused the evidence improperly, the Divisional Court does not as a rule send the case back for a new trial, but the court often says, 'We will sit on such a day; you can bring the evidence you desired the judge to hear and we will hear it here.' We hear the evidence and determine the case then and there, without sending it back with all the risk, expense, inconvenience, annoyance, and trouble of a new trial. If there is a row about the pleadings—because even yet we have some people who talk about pleadings, though pleadings are pretty nearly defunct in our courts, we know them by name and know them by sight, but we pay very little attention to them—if there is any row about the pleadings we say: 'Very well, we will amend the pleadings.' If a lawyer says: 'If that amendment had been made in the court below, we should have had other evidence,' we may say: 'Very well, what day will suit you? We shall hear your witnesses.' One of our substantial rules, and one of the rules more beneficial than perhaps fifty of the other rules is this, all amendments are to be made which are necessary in order that judgment shall be given according to the very right and justice of the case. No case in Ontario fails from defect of form—that is one of our rules. Again, no disregard of forms laid down, or disregard of the time under which proceedings should be taken, no disregard of terminology, according to our practice, bars a man who has a right, of his right.''

The foregoing statement by Mr. Justice Riddell implies great freedom in interpreting rules of evidence. The leading question is employed until the witness arrives at the nub of his story. Witnesses are treated as though they had human feelings and the judge obviates a great deal of silly cross-examination by

construing the testimony if possible so that the witness will be considered both truthful and rational. When a case is called the judge scans the pleadings much as you go over the headlines of your newspaper. As the barristers advance to the bar the judge demands: "What is this all about, anyway?" He has already formed some idea and noted the names of the parties. In a minute or two the plaintiff's counsel informs the court of the matter in controversy. The defendant is then permitted to confess what is not in dispute and frequently it is possible at the outset to dismiss most of the witnesses. The trial will be half over in the time it takes to cross-examine one witness in an Illinois court. And why not? The lawyer in his office gets the testimony from several witnesses in an hour or two at most. Why should it take more than twice as long in open court to accomplish the same thing?

Coincident with the examination of witnesses there may be a comparison of precedents between counsel and judge and not infrequently these informal discussions so fully cover the case that argument after evidence is in is quite unnecessary. If there be no jury the argument is not likely to exceed five minutes. It will commonly be confined to consideration of the application of a precedent. Throughout the trial there can be no wearisome reiteration of questions, no horsing between counsel, no bombast, no rhetoric, but there is usually a matching of wits and knowledge of the law which makes a trial an intellectual treat to a visiting lawyer. Some of the older barristers find it hard to forget the practice of their youth, but the younger men and the more clever of the older ones have abandoned the old dramatic way of trying law-suits

Sitting with Mr. Justice Riddell in the Toronto Assize I heard a case which typifies the informal and flexible procedure of Ontario courts. The plaintiff, Mary Smith, sued a certain broker. She had bought mining shares over a period of five years and on final accounting believed that she had been defrauded. Following the usual custom the broker had held the certificates in his vault and plaintiff had never had them in

actual possession or even seen them. At the start it was explained that plaintiff's sister, Kate Smith, had also dabbled in stocks, had employed the same broker, and had begun suit in her own behalf in the county court of the same county. Counsel for defendant said that the controversy had arisen from a confusion of the two accounts, that his client had bought all the shares ordered by either or both of the customers, but could not say whether certain orders had been joint or individual, or whether he had delivered to each plaintiff the shares which each had intended to buy individually.

"I will move the case of Kate Smith from the county court to this court," said his lordship. "During the lunch hour you will get the record of the case of Kate Smith and have it ready here at two o'clock. I will also join Kate Smith as a party to this action—with consent. Is it so understood?"

At two o'clock the court was prepared to ascertain the rights of all three. "It is understood now that Kate is a party to this action, and I have taken jurisdiction of the suit which she started in county court. Proceed." With this foundation it was disclosed in less than an hour that a misunderstanding had arisen because one sister had at times acted for the other in buying shares. The broker had supposed these purchases to have been made jointly. The accounts had become so confused that it would have been impossible to ascertain the rights of the parties in two separate actions. The judgment was that Kate should transfer certain shares to Mary. No costs were allowed the broker, because, as the learned justice said, he should refuse to deal with women, or take the natural consequences.

You know better than I what would have been the result of endeavouring to unravel this snarl in two distinct jurisdictions in the State of Illinois.

Another instance of the flexibility and informality which seems strange to a lawyer from the States. I was listening to argument on appeal. In the afternoon, approaching time for the court to rise, it was found that the record did not disclose a certain fact which had become essential. Under our system

nothing could have been done but remand the case for retrial. The chief justice turned to one of the barristers and asked if he could ascertain the point in question.

"I can tell by asking my partner," he replied. The partner was at some distance in another city.

"Wire your partner at once," the chief justice directed, "and when the court sits to-morrow morning be prepared to give us the information." And on the following morning I attended court again, expecting to hear the opposing barrister emit a lusty roar. But instead two telegrams were handed to the judges, the decision was announced in accordance therewith, and there was not a single word of objection."

Ontario has settled down to the theory of one trial and one review. Either party has it in his power to accomplish both steps in a comparatively short time. On our side of the line one of the most potent causes of delay and expense lies in appeal. So much so that many reformers would have the right of appeal limited as in federal practice. They observe that abuse of the appeal privilege is used for injustice; that it is a club which the powerful litigant uses on his weaker opponent if need be to gain his ends. But to limit appeal is to put a premium on pettifogging in the trial court and to give added incentive to overcontentiousness, which is at present the great evil of our system, and seems inseparable from a political judiciary. At first glance these reformers would doubtless say that ease and celerity of review would mean the appealing of every suit.

Not so, most emphatically. When appeal is simple and swift it cannot be used for sandbagging the weaker litigant. It results instead in a mutual desire on the part of both to make trial in the first instance complete and thorough. Ontario trials are in fact thorough in the first instance and though appeal is free there are fewer appeals than in the average American state. Difficulty of appeal, successive appeals, interminable delay, and the opportunity for reversal and retrial, which is the curse of law administration in Illinois, puts a premium on chicanery so that the litigant without a just cause bends every effort to make

the first trial defective. Only rarely can justice be done if there is more than one trial at bar. Inevitably time charges the relationship of the parties, the first trial shews the conscienceless suitor how to shape his case for retrial, and justice delayed is usually justice defeated.

The success of Ontario lies in the fact that the ablest lawyers in the province are available for the bench, that selection is by an expert agency, that there is an efficiency organisation, and that the judicial department is free to regulate procedure."

A RETIRING AGE FOR JUDGES.

The question of fixing a certain age, on attaining which Judges should retire from the Bench, has often been discussed, but there being, as in most controversies, a good deal to be said on both sides, the question has never been settled. In England for some time past a Royal Commission has been enquiring into the causes of delay in the King's Bench division, and the evidence taken before it has been published. The capacity of the Judges was one of the first subjects dealt with, and questions were asked as to whether a limit of age should be fixed for their retirement. The first witness called was Lord Alverstone, the Chief Justice, whose opinion being asked as to the retirement of Judges, said: "I should certainly not retire a Judge as long as he can do his work. I am quite satisfied that the best years of the Judges' lives in my lifetime have been the last ten years of their work. You want to learn to be a Judge. It is astonishingly difficult; a man may be a great lawyer and yet not a great Judge, and a man may be a poor lawyer and yet be an excellent Judge. Judges are appointed much younger now than they used to be, but the great men I have known have done their best work between the ages of 65 and 80, or certainly between 65 and 75."

The Chairman (Lord St. Aldwyn): "What I am now going to say has, as far as I know, no present application, but have not you known in the course of your professional life Judges

whose infirmities have certainly delayed business? Physical infirmities, yes, and I induced one most distinguished Judge to retire on that sole ground. His mind was as clear as a bell and his judgment excellent, but he was decrepit, and when I pointed it out to him he saw that the public could not disconnect apparent decrepitude and inability. You will see what I mean. He retired and lived for ten years afterwards, and up to the time of his death I would have taken his opinion on any point of law against the opinion of any man."

The Chief Justice was then asked whether it would be practicable to name a time at which the Lord Chancellor, the Chief Justice, or the Master of the Rolls, should be able to say to a Judge: "This is the time at which you may be required to retire, but you may be continued if we think it right in the public interest that you should be continued," just on the same principle that a civil servant in a high position may be required to retire or may be continued if it is well for the public service?

The Chief Justice replied that such a plan might be feasible, but he contended that as long as a Judge was able to do his work he should not be retired. It would be lamentable to take off the Bench some of the Judges now over a certain age.

Mr. Justice Phillmore was asked if he thought a Judge should retire at the age of 65. "I do not," he replied. "I am more than 65 myself. People's vitality had increased enormously since his childhood. Judges often did good work at 70. One man was old at 65. Another was not old at 75."

THE EFFECT OF A CODICIL CONFIRMING A WILL.

As is well known, a codicil almost invariably concludes with the following words: "And in all other respects I confirm my said will" [as altered by the said former codicils thereto]. But practitioners do not always bear in mind the force of such words. The effect of them is thus defined by Lord Justice Stirling in *Re Fraser; Lowther* v. *Fraser,* 91 L.T. Rep. 48; (1904) 1 Ch. 734, referring to several codicils: "The effect of this is to bring the will down to the date of the codicil and effect the same disposition of the testator's estate as if the testator

had at that date made a new will containing the same dispositions as the original will, but with the alterations introduced by the various codicils." Even that lucid definition is not free from difficulty. What is the meaning of the same dispositions?" Does it mean the same words of disposition, or the same subject of disposition? In cases of ademption the point may be of great importance. The question seems to have arisen in *Macdonald* v. *Irvine,* 38 L.T. Rep. 145; 8 Ch. Div. 108. There a testator being possessed of Egyptian Nine per Cent. Bonds specifically bequeathed them to various legatees. After the date of his will he married, and by a codicil, after making various dispositions, he confirmed his will. Between the dates of his will and of his codicil the testator sold his Egyptian Nine per Cent. Bonds, and with the proceeds of the sale and other moneys purchased other Egyptian Bonds, called Khedive Bonds; and it was held by Vice-Chancellor Hall that the specific legacies of the Egyptian Bonds were adeemed and that the Khedive Bonds formed part of the residue. The Vice-Chancellor said: "Where he confirms the will you must repeat it only in this sense, that you repeat the disposition in the will giving the thing which he gave by the will and not a different thing. I cannot make the codicil pass a different thing from that which was effectually disposed of by the will and would have passed by it" (see observations on that case in *Re Donald; Moore* v. *Somerset,* 53 S.J. 673); but suppose that instead of selling the Egyptian Nine per Cent. Bonds they had been merely converted into bonds for smaller amounts, such as from £100 to £20, the question would have been more difficult. Even without the words of confirmation in question, it was decided as long ago as *Barnes* v. *Crowe,* 1792, 4 B.C.C. 11, note (*c.*) that a codicil attested by three witnesses was a republication of the will, drawing down the date of the will to that of the codicil, unless a particular intent is shewn to the contrary (and see *Yarnold* v. *Wallis,* 4 Y. & C. Ex. 160). The point came before Mr. Justice North in *Re Champion; Dudley* v. *Champion,* 67 L.T. Rep. 344; 94 L.T. Jour. 57; (1893), 1 Ch. 101). There a testator by his will dated in April, 1873 devised a freehold cottage, with all the land thereto belonging,

described as "now in my own occupation," to two trustees upon certain trusts. In September, 1873, the testator bought two fields adjoining the cottage and occupied them with the cottage till his death. In 1877, he made a codicil by which he substituted new trustees for those named in the will, and confirmed his will in other respects. One of the questions was whether on the true construction of the will and codicil the two fields passed to the trustees with the cottage, and it was held that they did on several grounds, one of which was the effect of the words of confirmation in the codicil. After referring to the authorities Mr. Justice North said: "By these cases it seems to me perfectly well settled that, if there were nothing else in favour of the plaintiff, the codicil makes the will take effect as if it had been executed at the date of the codicil, and in that case it is conceded and there can be no doubt that the land coloured pink [that is, the two fields in question] would have passed under the will." That decision was affirmed on appeal in a very short judgment delivered by Lord Justice Lindley. It was followed in *Re Rayer; Rayer* v. *Rayer*, 87 L.T. Rep. 712; (1903), 1 Ch. 685. There a testator by his will made in 1882, gave certain annuities after the death of H. to her three children and charged the same on his real estate, and directed that they should be paid "without any deduction except for legacy duty and income tax." By a codicil made after the passing of the Customs and Inland Revenue Act, 1888, he made certain dispositions, and in all other respects he confirmed his said will. By that Act (sec. 21), legacy duty on legacies charged on real estate was abolished, and the duties under the Succession Duty Act, 1853, and certain additional duties, were made chargeable in respect of legacies (whether given by way of annuity or in any other form) charged on the real estate of any person dying after the 1st July, 1888. The testator died in 1892, and H. died in 1900, and thereupon estate duty and succession duty became payable in respect of the annuities given to her children, and the question arose, who was liable to pay the same? It was held by Lord Justice Farwell (then Mr. Justice Farwell) that the

effect of the codicil was to republish the will as from the date of the codicil, and that the testator, when he republished the will, must be taken to have known that there was no legacy duty, and that he intended the annuitants to pay the duty which at that date was in fact chargeable in respect of the annuities, but that the estate duty was payable out of the testator's residuary estate. In *Re Fraser,* before cited, the facts were shortly as follows: A testator by his will made in 1886 bequeathed all his personal estate, except what he otherwise disposed of by his will or any codicil, and except chattels real, to trustees upon certain trusts. And he devised and bequeathed "all real estate and chattels real in England to which I may be entitled at my death, except what I have otherwise disposed of by this my will," to his brother absolutely for all his estate and interest therein. The testator made seven codicils to his will, the last of which was made in July, 1898. In that codicil he stated that his brother was dead, but he did not revoke the bequest to him, or the general bequest of personalty, though he made some alterations in his will and the previous codicils. In other respects he confirmed his said will as altered by the prior codicils. It was held by the Court of Appeal, affirming the decision of Mr. Justice Byrne, that as the will and codicils must be read together, and the will treated as if made at the date of the last codicil, it could not be taken that the testator had excepted chattels real from the general bequest merely for the purpose of giving them to his brother, but that they were excepted for all purposes, and that consequently there was an intestacy as to chattels real, and that they did not fall into the general bequest. The case was distinguished from *Blight* v. *Hartnoll,* 48 L.T. Rep. 543; 23 Ch. Div. 218, because in that case the excepted property was specifically bequeathed, and as such bequest failed it fell into residue; but in *Re Fraser,* in events which happened, there was no disposition of the excepted property, because the apparent bequest of it was on the face of the instruments themselves ineffectual. *Re Fraser* is a strong case in support of the rule that the effect of a codicil confirming the will is to bring the will down to the date of the codicil.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—SHIP—SEAMEN'S WAGES—SHIP BECOMING UNSEAWORTHY BEFORE COMPLETION OF VOYAGE—DISCHARGE OF SEAMEN—MERCHANT SHIPPING ACT (57-58 VICT. C. 60), SS. 158, 162.

The Olympic (1913) P. 92. This was an action by seamen for wages. The plaintiffs had been engaged for a voyage from Southampton to New York and other ports for a year. The day the vessel left Southampton she came into collision with another vessel and became unseaworthy and had to put back for repairs, and on the following day the plaintiffs were discharged with three days' pay. The plaintiffs claimed that they were also entitled under s. 162 of the Merchants Shipping Act, 1894, to a further sum of a month's wages by way of compensation for the damages caused them by being discharged otherwise than in accordance with their agreement. The majority of the Court of Appeal (Williams and Buckley, L.JJ.), however, held that under s. 158, by reason of "the wreck of the ship," the services of the plaintiffs had terminated, and that they were properly discharged with three days' pay actually earned. Kennedy, L.J., dissented and thought the plaintiffs were entitled to a month's pay in addition as claimed.

INFANT—MAINTENANCE—NECESSARIES—REVERSIONARY INTEREST OF INFANT IN REAL ESTATE—CHARGING INFANT'S ESTATE.

In re Badger (1913) 1 Ch. 385. In this case an infant ward of Court, who was entitled to a reversionary interest in fee, and was without any means, applied to the court for authority to charge her reversionary interest with sums to be advanced for her maintenance; and that she might be bound, on attaining her majority, to ratify and confirm the charge. Joyce, J., refused to make the order asked, and the Court of Appeal (Buckley, and Hamilton, L.JJ.) affirmed his decision, holding that *In re Hamilton,* 31 Ch.D. 291, and *Cadman* v. *Cadman,* 33 Ch.D. 397, were authorities binding on the court, and that an estate of an infant not in possession could not be charged by the order of the court for the maintenance of the infant, because such interests cannot be delivered in execution. But it is possible that what was asked in this case might be done in Ontario: see 9 Edw. VII: c. 47, s. 32.

EVIDENCE—NON-PAROCHIAL REGISTERS—SOCIETY OF FRIENDS—DIGEST OF REGISTER KEPT BY SOCIETY OF FRIENDS—CERTIFICATE OF RECORDING CLERK.

In re Woodward (1913) 1 Ch. 392. In an inquiry before a Master as to next of kin of a deceased person, in order to prove marriages, births, and burials, the certificate of the entries in a digest of the registers of the society which had been deposited at Somerset House under a statute, were tendered, and held by Eady, J., to be inadmissible as the original registers were in existence. The registers of the society kept before July 1, 1837, when 6-7 W. 4, c. 26, came into force, were not admissible at common law, but under that Act on being deposited at Somerset House they were made evidence.

BUILDING SOCIETY — WINDING UP — PENSIONS—VOLUNTARY ALLOWANCE—ULTRA VIRES.

In re Birkbeck Benefit Building Society (1913) 1 Ch. 400. This was a winding up proceeding. The Building Society, in addition to its authorized business as a building society, had also carried on the business of banking and other businesses, all of which were carried on in one building and managed by the same board. The society was ordered to be wound up in 1911, and the business of banking was declared to have been ultra vires of the society. In 1903 a correspondence clerk of the society retired at the request of the society and was promised a pension, and in 1906 a clerk in the banking business also retired at the request of the board and was promised a pension. Both pensions were duly paid up to the making of the winding up order. Both pensioners claimed to prove as creditors for the capital value of their respective pensions; but Neville, J., held that the correspondence clerk's pension was a purely voluntary allowance, not founded on any contract, and therefore he could not recover; and that the clerk in the banking business, having been employed in a business which was ultra vires of the society, could not prove against the assets of the society.

WILL—DEVISE—TRUST WHICH MIGHT, BUT DID NOT IN FACT, OFFEND AGAINST RULE AGAINST PERPETUITIES—RULE AGAINST PERPETUITIES.

In re Fane, Fane v. *Fane* (1913) 1 Ch. 404. The question in this case was whether a disposition by will offended against the rule against perpetuities. The testator devised that upon his

wife's death the trustees should raise certain sums of money and subject thereto should assure the estates "to such uses for such estates and with and subject to such powers and provisoes as under and by virtue of" two deeds of July 5, 1854, and February 26, 1859, "and all mesne assurances, acts and operations of law" should at the time of the wife's death be subsisting and capable of taking effect. The widow died in 1912, and at her death there was nothing in the then subsisting uses, powers and provisoes of the estate in question which would, if inserted in the testator's will, have offended against the rule against perpetuities. Eve, J., however, thought that as there was a possibility that the rule might have been infringed, the devise was invalid, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Hamilton, L.JJ.) reversed his decision. Buckley, L.J., says that *Dungannon* v. *Smith* (1846), 12 Cl. & F. 546, on which Eve, J., rested his decision, is not an authority for the proposition that uncertainty of the testator's death, whether the limitation introduced by reference will exceed the rule or not, is a ground for saying that the rule against perpetuities has been infringed.

MONEY HAD AND RECEIVED—PAYMENT UNDER COMPULSION OF LAW —LEGAL PROCESS OF FOREIGN COURT—ACTION TO RECOVER MONEY PAID UNDER COMPULSION OF PROCESS OF FOREIGN COURT.

Clydesdale Bank v. *Schroder* (1913) 2 K.B. 1. In this case the plaintiffs were mortgagees of a ship, and the plaintiffs notified the mortgagors that on arrival of the ship at a Chilean port they intended to take possession under the mortgage. She arrived at the port named and the plaintiffs took possession, and while in that port the defendants instituted proceedings against the vessel in the Chilean Court, claiming a lien for advances made to the ship, and the vessel was at their instance arrested under an order of the court. In order to obtain her release the plaintiffs paid the defendants' demand under protest, and stated that they reserved their right to open up the matter in England, and the present action was brought to recover the money so paid; but Bray, J., who tried the case, held that the rule of law which prevents the recovery of money paid under compulsion of law, applies to money paid under the compulsion of the process of a foreign court, and that therefore the action would not lie. The learned Judge points out that the plaintiffs' proper course in the circumstances was to have applied to the

Chilean Court for leave to pay money into court to release the vessel, and to have obtained leave to contest the defendants' claim in that court.

BILL OF EXCHANGE—IRREGULAR INDORSEMENT—INDORSEMENT BY WAY OF SECURITY—BILLS OF EXCHANGE ACT, 1882 (45-46 VICT. c. 61), ss. 20, 55, 56—R.S.C. 119, s. 31, 130, 131.

Starr v. *Holland* (1913) 2 K.B. 15. In this case a similar question was in issue to that in *Robinson* v. *Mann* (1901) 31 S.C.R. 464; and *Duthie* v. *Essery* (1895) 22 App. R. 291, and the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) have come to a contrary conclusion. The plaintiffs drew a bill on a company to whom they had sold goods for the price, payable to their own order, there being an agreement that the defendants, who were directors, should indorse the bill. This they did before any indorsement of the bill by the plaintiffs as payees. In this condition the bill was returned to the plaintiffs, and in the present action they claimed to recover against the directors as indorsers. Section 56 (R.S.C. c. 119, s. 131) on which Strong, C.J., founded his judgment in *Robinson* v. *Mann*, in this case is held not to be applicable to such a state of circumstances, because, as the court holds, the bill not having been indorsed by the payees, it was never really negotiated. Their Lordships followed *Jenkins* v. *Coomber*, 1898, 2 K.B. 168, which decided that the principles laid down in *Steele* v. *McKinlay*, 5 App. Cas. 754, are not affected by the provisions of the Bills of Exchange Act. Before parting with this case it may be noted that while *Robinson* v. *Mann* was followed by the Court of Appeal in *McDonough* v. *Cook*, 19 O.L.R. 267, the Divisional Court on an appeal from a County Court, as being the final Court of Appeal in such cases, refused to follow *Duthie* v. *Essery*, and followed *Jenkins* v. *Coomber*, supra; see *Canadian Bank of Commerce* v. *Perram* (1899) 31 Ont. 116; and see also *Clapperton* v *Mutchmor* (1899) 30 Ont. 595. As the Appellate Division is now the tribunal for disposing of appeals from County Courts, it will probably consider itself bound by *Robinson* v. *Mann*, rather than *Canadian Bank of Commerce* v. *Perram*, notwithstanding its being a final court in such cases. One cannot but fail to see, however, that if the question ever reaches the Judicial Committee of the Privy Council, there are very considerable chances that *Robinson* v. *Mann* might be overruled.

HOMICIDE — MURDER OR MANSLAUGHTER — PROVOCATION BY WORDS—PARTIES ENGAGED TO BE MARRIED—CONFESSION BY INTENDED WIFE OF IMMORALITY.

The King v. *Palmer* (1913) 2 K.B. 29. The defendant was indicted for the murder of a young woman with whom he had been keeping company for two or three years, and to whom he was engaged to be married. According to his own statement the defendant had been to Canada and on his return met the deceased and told her that he had decided to give up his trade and return to Canada, to which she replied that if he did she would go on the town, and he then asked if she really meant it, and she said she did, that she had done it before, and would do it again, and thereupon took off her ring and threw it in his face. The defendant thereupon seized her and cut her throat with a razor which he had in his pocket. The Judge told the jury that "no provocation by words, however opprobrious, in a case where a deadly weapon is used, can, in law, reduce the crime from murder to manslaughter." The prisoner was convicted, and applied for leave to appeal on the ground of misdirection, but the Court of Criminal Appeal (Channell, Bray, and Coleridge, JJ.) dismissed the application, the court being of opinion that though the sudden confession of a wife of her past adultery might be sufficient provocation to reduce the crime of a husband in killing her to manslaughter, yet that principle could not be extended to persons as between whom the relation or quasi-relation of husband and wife does not exist, although the court agreed that it would perhaps have been more accurate if the judge had said that words cannot constitute sufficient provocation, except in very special circumstances.

ARBITRATION—SPECIFIC QUESTION SUBMITTED—AWARD—ERROR IN LAW—APPLICATION TO SET ASIDE AWARD.

In re King v. *Duveen* (1913) 2 K.B. 32. In this case a specific question was submitted to arbitration. The arbitrator made an award finding that Duveen was not liable to pay damages in respect of a nuisance he had occasioned to King, by buildings erected on Duveen's own premises, which adjoined King's. King moved to set aside the award as being bad in law on its face. On the part of Duveen it was contended that as the specific question was left to the arbitrator, his decision was final, even though it were shewn to be erroneous in point of law, and with that view Channell and Bray, JJ., concurred.

LANDLORD AND TENANT—SURRENDER OF TENANCY—TENANT REMAINING IN POSSESSION AFTER TERMINATION OF TENANCY—EXECUTION—CLAIM OF LANDLORD FOR RENT—8 ANNE, C. 14, SS. 6, 7—COUNTY COURTS ACT, 1888 (51-52 VICT. C. 143), S. 160—(LANDLORD AND TENANT ACT (1 GEO. V. C. 37), SS. 40, 55, ONT.)

Lewis v. *Davies* (1913) 2 K.B. 37. In this case the defendant was the tenant of a farm house and land and agreed with his landlord to give up possession on March 25, 1912. He gave up possession of the land, but was permitted by the landlord to remain in possession of the house without payment of rent until the landlord should require him to give up possession of it. The defendant remained in possession of the house and was so in possession on July 9, 1912, when goods in the house were seized under execution against the tenant. The landlord under 8 Anne, c. 14, ss. 6, 7, and the County Courts Act (see 1 Geo. V. c. 37, ss. 40, 55, Ont.), claimed to be paid out of the proceeds of the execution rent which had become due on 25th March under the tenancy of the farmhouse and land. An interpleader issue was granted and was decided by the judge of the County Court adversely to the landlord, on the ground that a new tenancy had been created on the 25th March, 1912, and that therefore the right to distrain after the termination of the tenancy under the statute of Anne, supra, had ceased; but the Divisional Court (Channell and Bray, JJ.) held that the mere permission of the landlord to the tenant to continue in possession did not create a new tenancy in the sense meant in *Wilkinson* v. *Peel* (1895) 1 Q.B. 516, so as to bar the landlord's right of distress for the previously accrued rent.

GUARANTY—INDEMNITY—ORAL PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—GUARANTY OF DEBT OF COMPANY BY DIRECTOR—DEBENTURE CONSTITUTING LIEN ON COMPANY'S ASSETS HELD BY GUARANTOR—STATUTE OF FRAUDS (29 CAR. 2, C. 3), S. 4—(R.S.O. C. 338, S. 5.)

Davys v. *Buswell* (1913) 2 K.B. 47. In this case the defendant counter-claimed against the plaintiff for the price of goods supplied by the defendant to a company of which the plaintiff was a director, and of which the defendant claimed that the plaintiff had guaranteed payment. The plaintiff had advanced moneys to the company and held a debenture which was a floating security on all the assets of the company. The de-

fendant had been in the habit of supplying goods to the company for the purposes of their business, and a balance being due in respect thereof, he threatened not to supply any more goods unless it were paid, whereupon the plaintiff orally promised, as the jury found, that he would be answerable for the price of the goods to be supplied if the company made default. The jury found that the plaintiff was induced to make the promise because he had the debenture. The plaintiff set up as a defence the Statute of Frauds, and the question was raised whether in the circumstances the promise in question was a guaranty or a promise of indemnity. Lord Coleridge, J., who tried the action, came to the conclusion that the case was not within the Statute of Frauds because of the ownership by the plaintiff of the debenture, which he considered brought the case within the principle deducible from what was said in *Harbury India Rubber Comb Co.* v. *Martin* (1902) 1 K.B. 778 (see ante vol. 38, p. 538); but the Court of Appeal (Williams and Kennedy, L.JJ., and Joyce, J.) reversed his decision, holding that the case was within the statute as being a promise to answer for the debt of another, and that the ownership of the debenture was immaterial.

CREDITOR—RETURN OF GOODS TO CREDITOR—FRAUDULENT PREFERENCE.

In re Ramsay (1913) 2 K.B. 80. This was a bankruptcy case, and the question was whether a return of goods made by the bankrupt to a creditor was a fraudulent preference. The bankrupt being in financial difficulties, wrote to his principal creditor, whose claim amounted to £3,000, and who held current bills for £1,000, two of them for £521 just falling due, asking to have one of the bills renewed. The creditor replied that they must be met, and the account considerably reduced. On the following day the creditor saw the debtor and demanded a substantial payment or a return of goods, otherwise he would make it hot, for the debtor. The debtor agreed to return goods and in the next few days returned goods to the value of £1,808, being more than three times the amount of the overdue bills. Within three months thereafter the debtor became bankrupt. The trustee applied to have the return of goods declared to be a fraudulent preference, and Phillimore, J., who heard the application, held on the evidence that the return of the goods was not caused by any real pressure on the part of the creditor, and was a voluntary act of the debtor, and therefore was a fraudulent preference as claimed.

ACTION BY OFFICIAL RECEIVER—DISMISSAL OF APPLICATION—PERSONAL ORDER FOR PAYMENT OF COSTS BY RECEIVER.

In re Williams (1913) 2 K.B. 88. In this case an official receiver of a bankrupt firm's estate, made an unsuccessful application for an order adjudicating that a person alleged but denied to be a partner, was a partner of the firm. The registrar dismissed the application and ordered the receiver personally to pay the costs. The official receiver appealed, but the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Hamilton, L.JJ.) held that in such a case the court has jurisdiction to order the official receiver personally to pay costs, and that the registrar had properly exercised the jurisdiction.

TRIAL—APPLICATION FOR NONSUIT AT CLOSE OF PLAINTIFF'S CASE—EVIDENCE SUBSEQUENTLY CALLED ON BEHALF OF DEFENDANT—APPEAL—CONSIDERATION OF ALL EVIDENCE GIVEN AT TRIAL.

Groves v. Cheltenham and E. G. Building Society (1913) 2 K.B. 100. In this case a question was raised which often arises at the trial of actions. At the close of the plaintiff's evidence counsel for the defendants moved for a nonsuit, which was refused. He then adduced evidence on behalf of the defendants and judgment was given at the trial in favour of the plaintiff. The defendant appealed and on the argument contended that if the court found that on the plaintiff's evidence there ought to have been a nonsuit, the subsequent evidence given on behalf of the defendant ought to be disregarded; but Lush and Rowlatt, JJ., held that in such a case the evidence given by the defendants cannot be disregarded, but that the court, according to the modern practice, is bound to look at all the evidence—and, doing so in the present case, they allowed the appeal.

CHARTER PARTY—LUMP SUM FOR FREIGHT—LOSS OF SHIP BY EXCEPTED PERIL—LOSS OF PART OF CARGO—DELIVERY OF PART OF CARGO—RIGHT OF SHIP OWNER TO FREIGHT.

Harrowing Steamship Co. v. *Thomas* (1913), 2 K.B. 171. This was an appeal from the decision of Pickford, J. (1912), 2 K.B. 321 (noted ante p. 69), in which the Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held, affirming the decision of Pickford, J., that the ship owners having delivered so much of the cargo as they were not excused by excepted perils for not delivering, had performed their contract and were entitled to recover the lump sum for freight agreed on.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Lord Chancellor Haldane, Lords Dunedin, Atkinson, and Moulton.] [Feb. 19.

GORDON v. HOLLAND.

HOLLAND v. GORDON.

CONSOLIDATED APPEALS FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Partnership—Fiduciary relation of partner—Wrongful sale of partnership assets—Repurchase from bonâ fide purchaser without notice.

These were cross-appeals from a judgment of the Court of Appeal for British Columbia (Macdonald, C.J., and Galliher, J., Irving, J., dissenting) varying a judgment of Gregory, J., at the trial, which had granted to Gordon, the plaintiff in the action, a portion of the relief for which he prayed.

A member of a partnership, in violation of the express terms of the partnership agreement, without the knowledge of his co-partner, sold land the property of the partnership to a *bonâ fide* purchaser for value without notice, and afterwards repurchased the land from him.

Held, that he stood in a fiduciary relation to his partner, and came within the exception laid down in Barrow's case (42 L.T. Rep. 891, 14 Ch. Div. 432) to the rule which protects a purchaser with notice taking from a purchaser without notice, and must account for all profits made by subsequent dealings with the land.

Judgment of the Court below varied.

Knox v. *Gye* (L. Rep. 5 H.L. 656) and *Piddocke* v. *Burt* (70 L.T. Rep. 553; (1894) 1 Ch. 343), distinguished.

Buckmaster, K.C., and Hon. *M. Macnaghten,* for Gordon. *E. P. Davis,* K.C., *Atkin,* K.C., and *C. H. Sargant,* for Holland.

Lords Atkinson, Shaw, and Moulton.] [March 14.

NATIONAL PROTECTOR FIRE INSURANCE COMPANY v. NIVERT.

Fire insurance—Policy—Construction—Provision that interest of insured in property should not be transferred—Provision that other policies should be declared and mentioned.

This was an appeal from a judgment of His Majesty's Supreme Court for the Ottoman Dominions in favour of the respondent, the plaintiff below, in an action brought by him against the appellant company to recover 1200*l.* under two policies of fire insurance in respect of the loss sustained by him through the destruction of the insured property by fire.

A policy of insurance against damage by fire provided that a transfer by the insured of his interest in the property should render the policy void.

Held, that a lease of the property for one year, the lessor continuing to pay the insurance premium, did not amount to a transfer of interest within the meaning of the conditions.

The policy further provided that the existence of other insurances should be declared to the insurers and mentioned in the policy or by indorsement on it.

Held, that the fact of the existence of further insurances was all that need be mentioned, and that the names of the insurers with whom they were effected need not be stated.

Judgment of the Court below affirmed.

E. F. Spence and *J. F. Collinson,* for the appellant company. *F. D. Mackinnon,* for the respondent.

Dominion of Canada.

[SUPREME COURT.]

Ont.] [May 6.

STONE *v.* CANADIAN PACIFIC RY. CO.

Railway—Negligence—Foreign Car—Protection of Employees —R.S.C. (1906), *c.* 37, *s.* 264, *s.-s.* 1 (*c*).

The Canadian Pacific Railway Co. had received a car with freight from the Wabash Co., and before returning, used it in a

shunting operation. A brakesman on top of this car which was approaching another with which it was to be coupled, saw that the knuckles of the coupler on each car were closed, and, being unable to signal the engineer to stop, climbed down a side ladder, none being on the ends, and tried to reach round to the lever of the coupler. In doing so he held on with his left hand to a rung of the ladder only twenty inches above where his left foot was placed. There was no room for his other foot, and as the train went over a crossing he was jolted off and fell with his right arm under the wheels of the car, injuring it so that it had to be amputated. In an action against the company, the jury found that the latter was negligent in not having end ladders on the Wabash car nor levers of sufficient length. A verdict for the plaintiff was set aside by the Court of Appeal (26 O.L.R. 121).

Held, reversing the latter judgment, that the company was liable for non-compliance with the provisions of sec. 264, subsec. 1 (*c*) of the Railway Act.

FITZPATRICK, C.J., dissented on the ground that the plaintiff's own negligence caused the accident.

Appeal allowed with costs.

Creswicke, K.C., and *C. C. Robinson,* for appellant. *Hellmuth,* K.C., and *MacMurchy,* K.C., for respondents.

N.B.] [May 6.

WEST *v.* CORBETT.

Negligence—Railway—Prescription — Damage or Injury "by Reason of Construction"—Contractor — Transcontinental Railway Commissioners—Railway Act, s. 306.

Section 15 of the National Transcontinental Railway Act provides that "the Commissioners shall have, in respect to the eastern division, . . . all the rights, powers, remedies and immunities conferred upon a railway company under the Railway Act."

Held, FITZPATRICK, C.J., and IDINGTON, J., dissenting, that the provision in s. 306 of the Railway Act, that "all actions or suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be commenced within one year, etc.," applies to such an action

against the Transcontinental Railway Commissioners and also against a contractor for construction of any portion of the eastern division.

Held, per ANGLIN, J., that it applies also to an action against a contractor for constructing a railway for a private company incorporated by Act of Parliament.

Appeal dismissed with costs.

F. R. Taylor, for appellant. *Teed,* K.C., for respondents.

Ont.] [May 6.

ROBINSON *v.* GRAND TRUNK RY. CO.

Railway Co.—Carriage of Passenger—Special Contract—Notice to Passenger of Conditions—Negligence—Exemption from Liability.

P. at Milverton, Ont., purchased a horse for a man in another town who sent R. to take charge of it. P. signed the way-bill in the form approved by the Board of Railway Commissioners, which contained a clause providing that if the consignee or his nominee should be allowed to travel at less than the regular fare to take care of the property, the company should not be liable for any injury to him whether caused by negligence or otherwise. R. was not asked to sign the way-bill, though a form endorsed provided for his signature and required the agent to obtain it. The way-bill was given to R., who placed it in his pocket without examining it. On the passage he was injured by negligence of the company's servants.

Held, that R. was not aware that the way-bill contained conditions.

Held, also, Fitzpatrick, C.J., dissenting, that the company had not done all that was incumbent on them to bring notice of the special condition to his attention.

Judgment of the Court of Appeal (27 O.L.R. 290) reversed, and that of the trial judge (26 O.L.R. 437) restored. Appeal allowed with costs.

McKay, K.C., and *Haight,* for appellant. *D. L. McCarthy,* K.C., for respondent.

Ont.] [May 6.

FLEMING v. TORONTO RY. CO.

Negligence—Street railway—Explosion—Defective controller—Inspection.

S. was riding on the end of the seat of an open street car in Toronto when an explosion occurred. The car was still in motion when other passengers in the same seat, apparently in a panic, cried to S. to get off, and when he did not do so, endeavoured to get past him, whereby he was pushed off and injured. In an action for damages the jury found the company negligent in using a rebuilt controller in a defective condition and not properly inspected, and the motorman negligent in not applying the brakes.

Held, affirming the judgment of the Court of Appeal (27 O.L.R. 332) that the evidence justified the jury in finding that the controller had not been properly inspected and that a proper inspection might have avoided the accident:

Per Idington and Brodeur, JJ., Anglin and Davies, JJ., contra, that the motorman should have applied the brakes.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for defendants appellants. *Gamble,* K.C., for respondent.

Ont.] [May 6.

MERRITT v. CITY OF TORONTO.

Riparian rights—Interference—Evidence.

M., claiming to be a riparian owner on the shore of Ashbridge Bay (part of Toronto harbour), claimed damages from, and an injunction against, the city for interference with his access to the water when digging a channel along the north side of the bay.

Held, affirming the judgment of the Court of Appeal (27 O.L.R. 1), by which an appeal from a Divisional Court (23 Ont. L.T. 365) was dismissed, that the evidence established that between M.'s land and the bay was marsh land and not land covered with water as contended, and therefore M. was not a riparian owner.

Appeal dismissed with costs.

Mowat, K.C., for plaintiff appellant. *Geary,* K.C., and *Colquhoun,* for respondent.

Province of Ontario.

SUPREME COURT.

Middleton, J.] [May 5.

Re Dorward.

Will—Construction—Residuary devise—Ignorant use of printed forms—Intention gathered from will.

Motion by the executrix for an order declaring the construction of the will of Walter Dorward, who died on the 22nd February, 1911.

Middleton:—"The country conveyancer" and "The man who makes his own will" are favourite toasts at lawyers' gatherings. "The man who invented printed will-forms" will soon be equally popular. As excellent as these forms often are, so many errors arise in filling them up, that already a formidable list of cases can be found dealing with the problem prescribed. This testator used the same form as that considered in *re Conger,* 19 O.L.R. 499, and filled it up in the same way, save that he inserted his wife's name in the clause for the appointment of executors, and left the space blank in the residuary devise. So the will reads: "All the residue of my estate not hereinbefore disposed of I give devise and bequeath unto and I nominate and appoint Mrs. Isabella Dorward to be executrix of my last will and testament." This can, I think, be read as an awkward sentence by which the wife is made residuary devisee as well as executrix. Dorward did not mean to die intestate, and I think that from the will itself his intention can be gathered, and that intention was to give his property to his wife.

May v. *Logie,* 27 O.R. 505 and 23 A.R. 785, shews that the intention may be gathered and given effect to, even when the actual words used do not form a sentence, and are quite incapable of grammatical analysis.

Shirley Denison, K.C., for the executrix and for William and David Dorward. *H. M. Ferguson,* for the other next of kin.

Mulock, C.J.Ex., Clute, Riddell,
Sutherland, and Leitch, JJ.] [May 13.

RE ROYSTON PARK and TOWN OF STEELTON.

Registry Act—Subdivision of lands—Plan—Approval by Municipal Council or by County Judge—Jurisdiction.

By 10 Edw. VII. c. 60, s. 80 (18) it is provided that "The registrar shall not register any plan upon which any street, road or lane is laid out unless there is registered therewith the approval of the proper municipal council or the order of the judge of the County or District Court . . . approving of such plan made upon notice to such council." The contention was as to the construction to be placed on this section in reference to the respective jurisdictions of municipal councils and county judges.

Held, 1. That although the word "or" was to have its ordinary alternative meaning and should not be read "and," there being two courses prescribed by the statute, either of them might be adopted by the owners of the land, and the fact of their having chosen one of the alternatives did not preclude a resort to the other.

2. The refusal of the council to grant the approval of the plan was not a judicial determination of the rights of the parties, and such refusal was no bar to application for approval by the County Judge. See *Elliott* v. *Turner*, 2 C.B. 446; *Birley* v. *Toronto, Hamilton and Buffalo Ry. Co.* (1898) 25 A.R. 88; *Town of Aurora* v. *Village of Markham* (1902) 32 S.C.R. 457.

A. R. Clute, for the applicants (appellants). *H. S. White*, for the town.

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THE KING v. *THE ROYAL BANK.*

The strictures of Mr. J. S. Ewart, K.C., on the decision of the Judicial Committee of the Privy Council in the above case which appeared in a recent number of a legal contemporary do not appear to be well founded.

Where a critic of the decisions of the Highest Court of the Empire feels compelled to confine his criticism to a mere technical view of the case, one may rest assured that it is because he can find no fault with the substantial justice of the decision—such we think is the result of Mr. Ewart's criticism. Technically and as a matter of law he thinks the decision is at fault, but as a matter of substantial justice there is no fault to be found with it. We entirely agree with Mr. Ewart in so far as he finds no fault in the justice of the decision, and as regards his legal and technical objections, we are inclined to think his arguments have the singular merit of shewing that they are without any reasonable foundation.

Looking at the matter from the point of view of abstract justice and right, the merits of the decision are manifest. It is merely the giving effect to a well established principle of the Common Law which we cannot express better than in the Lord Chancellor's own words, viz.:—

"That where money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use."

Let us recall the facts. A company was empowered by the Provincial Legislature of Alberta to build a railway within the province, and, for the purpose of providing funds for the under-

taking, it was authorised to issue bonds which were to be a charge on the undertaking, and were also to be guaranteed by the Provincial Government. The money required was raised by the sale of bonds in England, and the money finally found its way to the Royal Bank, whose head office is in Montreal. This was apparently effected in the usual way such transactions are effected, if not by the transmission of so much gold from England to Montreal, but by the usual method of bankers in one place giving credit to bankers in other places; thus the money appears to have been credited to a New York firm, and then by the New York firm credited to the Royal Bank in Montreal. This bank had a branch in Alberta, and without any money being actually transmitted the branch was authorised by the head office to credit the amount of the deposit to the Provincial Government; to be applied, of course, in accordance with the provisions of the Act, under which the money had been borrowed. This would, in substance, be that, as the work of the building of the road progressed, the money raised by the sale of the bonds would be applied in payment for its construction, and the bondholders would thus have acquired a mortgage on the undertaking as it progressed, together with the guarantee of the Provincial Government as a security for the payment of the bonds.

For some reason or other the railway company was unable to proceed with the undertaking and made default in payment of the interest on the bonds, whereupon an Act of the Provincial Legislature was passed practically confiscating the interest of the railway company in the proceeds of the bonds, and vesting the whole of the money in the province, which assumed full liability for the payment of the bonds.

It must be admitted that the Act in question was a very extraordinary and unusual piece of legislation. It took from the bondholders part of the security on which their money was advanced, namely a constructed railway, and required them to be content with the liability of the province alone; surely a very high handed proceeding, and one hard to be defended on any

ethical principle, and, on the contrary, having the appearance of a flagrant breach of faith, and giving rise as the Judicial Committee of the Privy Council held, to an equitable right to the bondholders to demand back their money. The Judicial Committee have held that this equitable right of the bondholders cannot, in the circumstances of the case, be confiscated by the Provincial Legislature, and in so doing, as must be apparent to every dispassionate observer, substantial justice has been done.

But of course the doing of substantial justice is not technically justifiable if it is done at the expense of a violation of positive law. Where the law requires substantial injustice to be perpetrated the remedy has to be found in legislation and not by judicial decisions, though we are afraid that this rule may sometimes be found to have been evaded.

We will therefore proceed to consider the matter from its strictly legal aspect. Even though the Act was an apparent violation of natural justice, was it nevertheless within the power of the Provincial Legislature?

It is assumed by Mr. Ewart that the property with which the Provincial Legislature dealt was property within the province, because, as we have said, the money was on deposit in a branch of the Royal Bank in Alberta, but Mr. Ewart is too excellent a lawyer not to know that a deposit of money in a bank, does not mean that so much specific money belonging to the depositor is in the vaults of the bank, but, on the contrary, is nothing more than a mere debt or chose in action; and a mere debt or chose in action though a valuable piece of property in its way, is nevertheless something that exists in the realm of fancy, you cannot see a debt, or handle a chose in action; they are legal abstractions, valuable it is true, but having no corporal existence, So far as they have a locus, it must be in the person of the debtor. and in the case of a corporation at its head office; though for the purposes of business the corporation may treat it as existing in any of its branch offices if it choose. In the present case the head office of the bank was at Montreal, and that was the locus of the debt, though quite possibly the bank might have been sued

for it within the province, and probably service of a writ upon its local manager would have been effective service sufficient to authorise a recovery of judgment in the Provincial court against the bank; but that circumstance cannot alter the locus of the debt which, as Lord Robson observed in *Rex* v. *Lovitt*, 1912, A.C., p. 218, quoting Lord Field in *Commissioner of Stamps* v. *Hope* (1891), A.C. 476, is the residence of the debtor.

In that case, however, the Judicial Committee held that money deposited in a branch of the bank of British North America in New Brunswick, the head office of which bank is in England, was (for the purposes of a Succession Duty Act) properly situate within the province and as such liable to Provincial taxation.

But the case of *Rex* v. *Lovitt*, though apparently an authority for saying that the money in question in this case was within the Province of Alberta is really quite distinguishable. The money, though to the credit of the Provincial Government, was really, until the conditions on which the bonds were bought were carried out, subject to the equitable right of the bondholders. They were no parties to the deposit in Alberta, as far as they were concerned, the Royal Bank at its head office was their debtor, and they were under no obligation to go to Alberta to recover the debt, as far as they were concerned, the locus of the debt to them was unquestionably not Alberta but Montreal, and what the Provincial Legislature in fact purported to do was to confiscate the rights of the bondholders in that debt whose locality was Montreal. This, as Mr. Ewart lucidly shews, is a kind of legislation which no Parliament can effectively indulge in. It is not merely a question of the construction of the B.N.A. Act and of the powers of a local legislature thereunder, it is really a question whether any Parliament could effectively pass such an Act? It might as well be said that if the money for the bonds had been deposited in the Bank of England, it could have been confiscated by the Province of Alberta; but even Mr. Ewart does not pretend that that could be validly

done. The money though nominally in Alberta was not in fact there, what in fact was the true substance of the matter was, that the Royal Bank in Montreal held money to which, in certain conditions, the railway company and the Provincial Government had right, but to which, until those conditions were performed, the bondholders had an equitable claim. The conditions being unperformed, the Provincial Legislature purported to confiscate the rights of the bondholders in the debt, although neither the bondholders nor their property were within the legislative jurisdiction of the province. It would be bad enough for a Provincial Legislature to confiscate the rights of persons subject to its jurisdiction, but to attempt to confiscate the rights of those who are not subject to its jurisdiction, is something which we are glad to find is not legally possible.

If the Province of Alberta desires effectively to confiscate the debt due by the Royal Bank to the bondholders, then the proper legislative forum would appear to be the Legislature of Quebec. It is not as Mr. Ewart suggests to be deduced from the decision in question that there is no legislative power to deal with the matter at all. The proper deduction is merely that the right forum has not dealt with it. Confiscatory legislation, if desired, must be sought in the place where the property to be confiscated is locally situate, and in the case of lebts that locality appears to be the residence of the debtor, no legislature is competent to confiscate property situate in another jurisdiction.

So far from this being an unsatisfactory decision from a legal point of view, we think it is one to be highly commended as displaying, as usual, the sound sense and thorough grasp of legal principles by which the decisions of the Judicial Committee are uniformly characterised.

The decision of this case by the Judicial Committee is in fact one of the many evidences of the value of that tribunal to the overseas Dominions and it would be a sorry day for the Empire if they were deprived of it.

TRADE UNIONS IN POLITICS.

Some time ago we called attention to the power which a certain combination of trades unions in England was able to bring to bear upon the means of transportation, upon which depend not only the whole industries of the country, but the very food of those by whom they are carried on. A condition of things was imminent which one can hardly bear to contemplate; fortunately the danger was for the moment averted, but the power for mischief still exists, and may at any time be brought into play for causes as trivial as those which actuated it on the occasion referred to.

Only the other day an engine driver on the Great Northern Railway was suspended for not coming to his work at the proper time. Possibly his delay may have had serious consequences, but that is immaterial so far as he was concerned. He had been guilty of a breach of discipline, for which he was properly punished. But the authorities of the union, having it in their power to suspend the whole operation of the railway and all that depended on it, demanded his reinstatement, and the company yielded. Comment is needless.

In the strike which has been going on in Belgium we have seen such a combination dealing—not with questions of wages, or hours of labour—but with the very foundations of constitutional government. Yielding to the threat of the stoppage of all industry, we have seen a Government throwing down a carefully constructed, and wisely balanced system of representation, and substituting for it, at the bidding of the trades unions, universal suffrage pure and simple, based upon absolute equality of the voters. It may be that universal suffrage is the proper basis on which to rest a system of constitutional government, but that it should be adopted, not as the result of careful consideration by those qualified by education, training and experience to deal with such subjects, but simply at the dictation of a body deficient in all those qualifications, strong only in numbers, and led by men who can only hold their leadership by being ready to carry

out the vagaries of an irresponsible multitude—that such things have come to pass should indeed make every thoughtful man ask whither are we drifting?

It matters little how high or how low is the qualification of the voter, or what the form of government is, if such an irresponsible body as a combination of trades unions can at any time by the threat of paralyzing the industries of the country, which practically means starvation of poor and rich alike, compel the authorities, whoever they may be, to grant any demand which, in the opinion of the trades unions, may seem likely to serve their interests. For a long time trade unions were content to devote themselves to questions of economy, and to a great extent the sympathy of the public was with them. But now the Socialistic element, which has been struggling for a long time to gain the supremacy in the unions, has been gaining ground, and, as in the case in Belgium, has succeeded in bringing the powers of the unions to carry out their own projects, social and political. That they will be satisfied with the success they have so easily gained is not to be expected. Appetite grows with what it feeds upon, and it will not be long before the next victim will have a warning to prepare for demolition. What has been done in Belgium may be done, or at least attempted, elsewhere, so let not those who are concerned—and who are not?—be surprised if they find themselves the object of similar attacks.

The Belgic constitution thus rudely assailed is of a peculiar character, having no counterpart in any of those which have sprung from the parent British ideas. It is based upon the common sense principle that while all should have a voice who are capable of expressing it, those should rule who are capable of ruling, and who must, of course, prove their capacity by their actions. We copy from the *Times* a brief account of this remarkable franchise:—

"Under the constitution of 1831 it was confined to taxpayers, but in 1893-4, after a threatened general strike, it was extended to all males twenty-five years of age resident for one year in the same constituency. With this extension, however,

was combined a system of plural voting. Two votes are allowed to heads of families thirty-five years of age, and to other men possessing a certain property qualification, and three votes to men holding certain diplomas or other proofs of superior education. The electoral system was again revised in 1899, when proportional representation was introduced, but plural voting remained. The Socialists have constantly agitated against it, and in 1902 attempted another general strike, which failed. They demanded universal adult suffrage for all men and women twenty-one years of age."

In the month of June last a general election took place, resulting in a gain for the Centrid party over both Liberals and Socialists. Upon this the present agitation began, for which the most careful preparation had been made.

The issue in this contest is clear. On one side numbers only count; on the other, the elements of possession of property, of education, and the stability of family life, are represented. Some sort of compromise may perhaps be agreed upon, but the victory is with the Socialists, and has been gained by the skilful use of that most potent weapon—the strike.

AN ANCIENT LAWSUIT.

Among the claims against the United States Government which the International Tribunal now in session will be called on to adjudicate, is one that has been pending over a hundred years. It arose prior to the war of 1812, and though the justness of the claim has been on more than one occasion admitted by executive and judicial functionaries of the United States, and Presidential messages have been sent to Congress recommending its payment, yet for some reason or another the necessary appropriation to liquidate the demand has never been made by Congress.

The facts of the case are simple and have also a somewhat farcical element. A certain vessel named the Lord Nelson, belonging to British subjects, was plying her ordinary trade on

Lake Ontario when, on the 5th June, 1812 (before the declaration of war), it was seized by a United States officer and carried into Sackett's Harbour.

On the 26th August, 1812, the vessel was libeled at the suit of the United States Government, in the District Court of the District of New York, and an interim decree was made ordering the vessel to be sold, and the proceeds to be paid into Court, to abide the result of the libel. A sale took place and the vessel was bought by the United States Government, refitted, and subsequently used as a vessel of war against the British in the war of 1812. The price paid for the vessel was $2,999.25, which was duly paid into the District Court; but the Government did not bring the libel to trial until 11th July, 1817, when the seizure was pronounced to have been illegal, and the proceeds of the sale were directed to be paid to the owner of the vessel. During the five years delay in bringing the case to trial, the Clerk of the District Court of New York had absconded and stolen the funds entrusted to his care, and the decree of the Court could not be carried out. Ultimately some of the money embezzled by the Clerk was recovered, of which $183.50 was attributable to the proceeds of the vessel in question. It was well established by a Congressional Committee and judicial investigation, that the sale had been made at an undervalue and that the true value of the vessel at the time of its seizure and sale was $5,000. The claimant now contends that he should be paid the $5,000 with interest from the date of seizure.

Some of the Judges who have investigated the claim have, as we have said, held it to be valid and just, and are of the opinion that it should be paid; some thought with full legal interest, others with interest at 4 per cent., and one thought that all the claimant should get was the $183.50 recovered from the defaulting Clerk.

The claimant's contention is, that as the United States Government was a wrongdoer from the beginning (and that that is so is admitted on all hands), therefore the claimant can in no wise be prejudiced by the legal proceedings which, as the issue

proved, were wholly unfounded, because the original tortious conversion of the claimant's property cannot be made any less tortious by the institution of a suit setting up an unfounded claim. That the loss of the money by the fraud of the Clerk is a loss that can in no sense relieve the original wrongdoer from liability; and the idea that the claimants are in any way responsible or compellable on any principle of justice to bear the loss so occasioned is untenable. That this age-long controversy falls to be settled in the year when we are celebrating a hundred years of peace with our neighbours, seems auspicious and it is to be hoped that though long delayed, justice may at last be done.

WAY OF NECESSITY, HOW ACQUIRED AND HOW LOST.

When we speak of a way of necessity we mean a private way, or an easement over the land of a different person from he who claims the right of way. It is a well recognized principle in law that a man cannot have an easement or right of way over his own land, which is separate and independent from the ownership of the land itself.

Blackstone, in speaking of this kind of an easement,[1] says:—

"A fourth species of incorporeal hereditaments is that of ways; or the right of going over another man's ground. I speak not here of the King's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right; though another be owner of the soil. This may be granted on a special permission; as when the owner of the land grants to another the liberty of passing over his grounds to go to church, to market, or the like; in which case the gift or grant is particular, and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign over his right to any other; nor can he justify taking another person in his company. A way may be also by prescription; as if all the inhabitants of such a ham-

let, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise by act and operation of law; for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it; and I may cross his land for that purpose without trespass. For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same."

The following outline is presented by Blackstone. Rights of way have been classified into three kinds.

First: those arising from necessity. Second: those created by grant or by reservation in a grant; and third: those arising by prescription. This classification, however, relates more particularly to the method in which such a way may be created or come into existence, than to the creation or right of a way itself. Because a right of way by necessity, as it is termed, exists by reason of it being necessary to the proper use of the estate to which it attaches: it has been considered, or at least so considered by writers who are not accurate in the use of their terms, as resting alone upon such necessity, and not upon a grant or implied contract. The better doctrine, however, and one which is conceded to be proper, has been announced by Judge Morton, in the case of *Nichols* v. *Luce*,[2] in the following:—

"The three different modes of acquiring and holding rights of way, in their origin, resolve themselves into one. The distinction between them relates more to the mode of proof than to the source of title. They are all derived from the voluntary grant of the proprietor of the fee. Prescription presupposes and is evidence of a previous grant. Necessity is only a circumstance resorted to for the purpose of shewing the intention of the parties and raising an implication of a grant. And the deed of the grantor as much creates the way of necessity as

does the way by grant. The only difference between the two is that one is granted in express words and the other by implication. Quando aliquis aliquid concedit, concedere, videtur et id sine quo res uti non potest. Thus, when a man grants a close inaccessible except over his own land, he impliedly grants a right of passing over that land. The same rule of construction would govern a reservation out of lands granted."

In *Barrett* v. *Taylor*,[3] it is said:—

"The deed of the grantor as much creates the way of necessity as it does the way of grant. The only difference between the two is, that one is granted by express words and the other only by implication. It is not the necessity which creates the right of way, but the fair construction of the acts of the parties."

Waite, J., in *Collins* v. *Prentice*,[4] says:—

"Although called a way by necessity, yet in strictness the necessity does not create the way, but merely furnishes the evidence of the real intention of the parties."

The usual example of the case where a way of necessity arises, is similar to that stated by Blackstone. That is, that where a man grants or sells to another a tract of land which has no method of access thereto, or ingress therefrom, excepting over the remaining lands of the grantor, that a way is granted over such remaining lands to the portion conveyed. This implied grant rests upon the theory that a person would not buy a piece of land, that he could not have access thereto, for without such access the land would be useless, and as people do not buy land except that they may have some use of it, the presumption is conclusive that it was bought upon the assumption that there was a way of ingress to such tract from some public highway; as such way could only be acquired through the modern method of condemnation over any of the adjoining lands belonging to other persons, it is proper that such right of way should be placed upon the lands of the person who made the conveyance, and it has been held that the mere fact that there might be a way that exists by virtue of the doctrine announced

by Blackstone and the text writers, as to the creation and existence of a way of necessity.

While the cases are in accord as to the necessary necessity for such right of way where lands are granted without the right of way being reserved to them or having access to a public highway, and that this furnishes a sufficient necessity for a right of way over the remaining lands of the grantor.

The difficulty arises in determining what is a proper necessity in cases where there is some possible way of reaching the lands conveyed, other than over the remaining lands of the grantor. Some courts, or text writers, rather, have laid down the doctrine that it is an indispensable necessity. That is, if it is possible to get out to a highway from the lands conveyed there can be no way of necessity. But generally upon this question the courts realize that it is not possible for them to lay down an absolute rule.

In one case, *Hyde* v. *The Town of Jamaica*,[5] it was said, that "it must be an indispensable necessity which would justify the use of a way of necessity." This case, however, was a case in which the way of necessity was one which was claimed by reason of a bridge being washed away and that there must be shewn in such cases, in order to relieve the public authorities from liability, that it was indispensable for the person to cross the same; however, in a recent case in California, *Casson* v. *Cole*,[6] it is said:—

"A way of necessity arises from the necessity alone, and continues while the necessity exists. Unquestionably appellant had a way of necessity across grantor's ranch until a road was dedicated to his use; but when that was done his right to a way of necessity ceased and it matters not that the old road was more convenient to his purpose, when it ceased to be the right ceased."

As to the necessity required, the following from *Lawton* v. *Rivers*,[7] shews the difficulty which the courts have recognized. Rendering the opinion the judge says:—

"I do not mean to say that there must be an absolute and irresistible necessity; an inconvenience must be so great as to amount to that kind of necessity which the law requires, and it is difficult and perhaps impossible to lay down, with exact precision, the degree of inconvenience which will be required to constitute legal necessity."

In this case there was a convenient way out by water, and the court refused to recognize the way out in another direction over land. It is not shewn in this case, however, that the way out over land at all seasons of the year would have been more valuable or more convenient than that by water way.

In *Nichols* v. *Luce*[8] this language is used:—

"It is not pretended that the bluff across the defendants' lands is impassable, but only that it is exceedingly difficult to pass it and that it would be much more convenient to the defendants to pass over plaintiff's lands; here is no such necessity as would raise an implication of grant of different way upon different parts of defendants' lot. Convenience, even great convenience, is not sufficient."

In *Ogden* v. *Grove*[9] it is said:—

"Convenience is no foundation for the claim, nor is actual detriments to possession of claimant resulting from necessity of a way through his own property, any reason to claim it through that of a neighbour."

In *Screven* v. *Gregorie*[10] it is said:—

"That great convenience is not sufficient."

In *Trask* v. *Patterson*[11] we find this language:—

"No implication of a grant of a right of way can arise from proof that the land could not conveniently be occupied without it; its foundation rests upon necessity."

In *Oroke* v. *Smith*[12] we have:—

"Query, whether the grant of a way existing de facto can be applied except in cases of strict necessity.

Semble, that claimant of such grant must be required to shew that without the way he will be subjected to an expense excessive and disproportioned to the value of his estate, or that

his estate clearly depends for its appropriate enjoyment on the way, or that some conclusive indication of his grantor's intention exists in the circumstances of his estate."

In *Alley* v. *Carollton*[13] it appeared that the lands were surrounded on one side by the Colorado River, and on the other sides by the remaining lands of the grantor. In passing upon this case, the court says:—

"The allegations of the petition, we think, however, may be fairly construed as shewing appellant to have been entitled to an enjoyment of a right of way of necessity appurtenant to his land over that of the appellee (grantor), at and previous to the commencement of this suit, which had been obstructed and interfered with by the appellee."

Here there was the recognition of the doctrine that an absolute necessity was not required, for there was nothing to shew, but what the Colorado River was navigable and access could be reached in that direction.

The case of *Pettinghill* v. *Porter*[14] is a leading case. Here an instruction to the jury, as follows, was approved:—

"That the deed under which the plaintiff claimed, conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in power of the grantor to convey. That it was not enough for plaintiff to prove the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her house, without unreasonable labour and expense. That unreasonable labour and expense means excessive and disapportionate to the value of the property purchased."

It will be observed from the above that the court attempts to lay down a rule as to what may be such inconvenience as will justify the finding of the necessity.

The authorities heretofore cited and quoted from, we believe, represents as near as possible the various opinions upon this proposition as to what will constitute such a necessity, from which it may be presumed that a right of way was intended to be conveyed by the grant of the grantor to the grantee. It is further, we believe, obvious that the courts have not been able

to lay down a definite rule. If we should follow those courts that hold that an indispensable necessity is requisite, then we would destroy the doctrine, or at least very seriously impair it, that the way rests upon a grant.

And it is probable therefore that the rule laid down in the case of *Pettinghill* v. *Porter*, hereinabove quoted from, that a way of necessity would be held to be implied within a grant, where no other way could be conveniently made from the highway to the land in question, without unreasonable labour and expense; and that what would constitute such unreasonable labour and expense would be a labour and expense excessive and disapportionate to the value of the property purchased.

The courts have held that this necessity should be clearly established for the reason that one man's land should not be taken for the benefit of another where the same could not be justified upon the existence of such a condition of facts from which a clear presumption could be implied, that the parties must have intended that some way was to have been included within the original conveyance.

While we think it is clear that the consensus of opinion of the courts is, that the right of way of necessity rests upon grant, yet the courts seem to have drawn a distinction between a right of way of necessity and a right of way by prescription, or express grant, in this: that it is not one of a permanent nature, although it is one running with the land, and will pass as appurtenant to the land so long as the necessity exists from which the grant might have been implied.

If it is shewn that such necessity exists at the time that the conveyance was made, that will conclusively shew a grant; must this strict necessity at all times continue in order that the right of way may not be lost, is a question which seems not to be conclusively settled.

In *Oliver* v. *Hook*,[15] while not strictly required for a decision of the case under consideration, the court says:—

"But this way of necessity is a way of new creation by operation of law and is only provisional, for it is brought into existence from the necessities of the estate granted and continues to

exist only so long as there may be necessity for its use. If, therefore, the grantee acquires a new way to the estate previously reached by way of necessity, the way of necessity is extinguished."

In this case it is only held that a way of necessity would pass under the ordinary provisions of a deed, to wit: that "all and every the rights, privileges, appurtenances and advantages to the same belonging," or that it might pass without such a covenant.

In *Pierce* v. *Selleck*[16] we find this language:—

"It is a fallacy to suppose that a right of way of necessity is a permanent right, and the way a permanent way attached to the land itself, whatever may be its relative condition and which may be conveyed by deed irrespective of the continuing necessity of the grantee."

In this case it was sought to retain the old way of necessity merely because it was more convenient to the use of the owner, than a new highway which was laid out along or through the tract. It was not shewn that the highway would not be as advantageous to the general use of the premises as the old right of way, but merely it was not as convenient to the use of the owner.

In *Holmes* v. *Seeley*[17] this quotation is used:—

"This was strongly exemplified in *Holmes* v. *Goring*, 2 Bing. 76, where it was decided that a way of necessity became extinguished because the party could conveniently reach his lot by means of a close of his own subsequently purchased."

It will be noticed from these quotations that it is generally held that the new way must be as convenient as the old way before it is lost.

Thus we have in *Vail* v. *Carpenter*,[18] where it is said:—

"A right of way of necessity ceases as soon as the owner of it can have a direct and convenient access over his own land to the place to which the way leads."

Then follows a longer quotation from *Holmes* v. *Goring*[19] as follows:—

"A way of necessity when the nature of it is considered will be found to be nothing else than a way by grant but grant of no more than the circumstances which raise the implication required should pass. If it were otherwise this convenience might follow that a party might retain a way over 1,000 yards of another's land when by subsequent purchase might reach his destination by passing over 100 yards of his own. A grant therefore arising out of the implification by necessity cannot be carried further than the necessity of the case requires."

The case of *New York* v. *Milner*[20] is a leading case. Here it is said:—

"Again the right of way of necessity over the lands of the grantor in a conveyance to favour the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way, but only continues so long as the necessity exists, and if the grantee of the dominant tenement, or those claiming under him, should afterwards by purchase or otherwise acquire a convenient way over his own lands to the tenement in favour of which the way of necessity previously existed, the way of necessity over lands of the original grantor of such tenement will cease. So if a convenient way to such tenement is subsequently obtained by the owner thereof by the opening of a highway to or through such tenement, a way of necessity only arises upon the implication of a grant and cannot be extended beyond what the existing necessity of the case requires. Such a right is only commensurate with the existence of the necessity upon which the implied grant is founded. When such necessity ceases the right of way also is terminated."

In *Porter* v. *Shuttlefield*[21] this language is used in the syllabus:—

"Where a party has a way by necessity over the land of another, the easement terminates with the necessity for the same, by reason of the construction of another way affording a reasonably convenient outlet."

We think from the language used by the courts in these various cases, that it may be reasonably inferred that where con-

ditions arise which may make it possible to have an access to a highway in some direction, that this possibility of access would not destroy the right of way unless it be shewn that it is one that is as convenient and valuable to the use of the land as was the way of necessity.

While it seems to be the settled opinion that the way of necessity rests upon grant, and that it will pass as an appurtenant to the lands to which it furnishes a way, yet the courts seem to have engrafted upon it a distinction from all other ways that are founded upon a grant, and that is that it is not a perpetual right, but exists only so long as the necessity which created it exists.

Thus in the leading case of *New York* v. *Millner*[22] it is said:—

"Again the right of way of necessity over the lands of the grantor in a conveyance in favour of the grantee and those subsequently claiming the dominant tenement under him, is not a perpetual right of way, but only continues so long as the necessity exists."

The same language is substantially found in *Palmer* v. *Palmer*,[23] also in *Pierce* v. *Selleck*.[24]

This brings up the analogous situation that a grant presumes a consideration and that although the grantee may have paid for something, yet he cannot exercise full ownership and transfer the right to some one else.

For instance, suppose that A should convey a piece of land to B, which was so situated that B would have a right of way of necessity over the lands of A, and that B should in turn convey his property to C, who owned adjoining lands that touched a public highway. Then C could, by reason of his ownership of other lands, reach the public highway without being compelled to exercise the way of necessity, which B had over the lands of A, and if the doctrine announced by the courts is to be carried out in its fullest extent C would be deprived of this right of way for the lands he had purchased out over the lands of A, notwithstanding the fact that such right of way might be an exceedingly valuable one and furnish a much better access to

the lands he had purchased from B than any way would over his remaining lands.

If such be true, C would not be willing to pay the full and fair value of the lands which he had purchased from B; if B had no right to convey to him the way of necessity which had been granted to him by A. It seems plain here that B would be unjustly deprived of a right of property which then existed in him.

In a careful examination of the various cases, this phase of the question does not appear to have been passed upon. Of course if the public granted him a new road, it would be fair, provided it was as good as the old way of necessity, to hold that it ceased to exist. So, if he chose to acquire a new way, which was as good, but why then require him to give up for nothing that which he bought and paid for? Must his act be held alone to benefit his grantor? Must he alone be punished because the way was not expressly mentioned in the conveyance?

It seems that there is some room for doubt upon the question whether such a holding would be just or whether it would be followed in all instances. And we are again driven to the conclusion that in all such cases it would be fair to require at least before the way of necessity is lost, that the way which displaces the one of necessity be one as convenient or as valuable to the lands, as was the way of necessity so displaced.

It has been held that where a person has a way of necessity and acquires the servient estate, that then the way of necessity is lost, but if he should afterwards sell the two pieces of property separately, the way of necessity would come into existence again. This is illustrated by the quotation in *Wheeler* v. *Gilsey*.[25]

In *Buckley* v. *Combes*[26] it was decided:—

"That if a person owned close A and a passage of necessity to it over close B and he purchased close B and thereby reunited in himself the title to both closes, yet if he after sold close B to one person without reservation and the close A to another person, the purchaser of close A has a right over close B."

Suppose A, the owner of one tract of land, sold to B another tract of land, so situated that B would have a right of way of necessity over the remaining lands of A, and B would sell his lands to C, who by reason of owning adjoining lands which reach to a public highway, and C be deprived of his way of necessity over A's lands, and thereafter C should sell the lands so acquired to D, who had no way to reach said lands except the old way of necessity or a new one over the lands of C: would D have conveyed to him the right to use the way of necessity over the lands of A?

Here the land is in the same condition and the same necessity exists as when B purchased it from A. If it should be held that D did not acquire such way, then it must be held that he would have a right out over the lands of C, and this would be in a certain sense, taking C's lands for the benefit of A, and give back to A lands which he had sold and for which it is presumed he received a consideration, and yet it would seem if the various decisions of the courts are strictly followed out, this would be just what would happen.—*Central Law Journal.*

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1. Volume 2, page 35.
2. 24 Pick. 102.
3. 35 Vt. 52.
4. 15 Conn. 39.
5. 47 Ver. 451.
6. 153 Cal. 677.
7. 2 McCord (S. C.) 445.
8. 41 Mass. 105.
9. 38 Pa. 491.
10. 8 Rich. (S. C.) 158.
11. 29 Me. 502.
12. 11 R. I. 259.
13. 29 Tex. 74.
14. 8 Allen 1.
15. 47 Maryland 379.
16. 18 Conn. 324.
17. 19 Wendell 510.
18. 80 Mass. 126.
19. 2 Bing. 76.
20. 1st Barb. Ch. 1.
21. 146 Iowa 512.
22. 1 Barb. Ch. 1.
23. 150 N. Y. 139.
24. 18 Conn. 321.
25. 35 Howard Pr. N. Y. 145.
26. 5 Taunt. 311.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

AWARD ACCEPTED AND ACTED ON—SUBSEQUENT APPEAL FROM PART OF AWARD—APPROBATE AND REPROBATE.

Johnson v. *Newton Fire Extinguisher Co.* (1913) 2 K.B. 111. This was a case under the Workmen's Compensation Act, 1906, in which the workman had applied for arbitration to fix the compensation, and an award was made fixing a certain sum per week to be paid. The workman acted on the award and accepted the compensation, but shortly afterwards appealed from the award as to costs. The Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Hamilton, L.JJ.) held that he could not do this; that having accepted and acted on the award, he could not appeal from any part of it—in short, he could not both approbate and reprobate.

CHATTEL MORTGAGE—DAMAGES FOR NEGLIGENT SALE BY MORTGAGEE—RESTRICTION ON CHARGES BY MORTGAGEES—PENALTY FOR EXCESS—BANK ACT (R.S.C. 1906, c. 29), s. 91—VOLUNTARY PAYMENT OF UNAUTHORIZED INTEREST.

McHugh v. *Union Bank* (1913) A.C. 299. This was an appeal from the Supreme Court of Canada. The action was brought by mortgagors against chattel mortgagees for an account in which the plaintiffs claimed credit for damages for negligence on the part of the mortgagees in selling the mortgaged property, consisting of houses, and also for a penalty being treble the amount of an alleged excessive charge by the mortgagees for expenses and commission on the sales. The stipulated rate of interest was 8%, but the defendant bank admitted it could not enforce a higher rate than 7%, while the mortgagors contended that only 5% could be recovered. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Atkinson, and Moulton) allowed the appeal in part, holding first that the findings of the judge at the trial as to the defendants' negligence in making the sales and as to the consequent amount of damages, were not shewn to have been erroneous and ought not therefore to have been varied by the Supreme Court of Alberta. Secondly, that the N. W. Can. Ordinances, c. 34, whereby a chattel mortgagee's charges in respect of seizure

and sale are limited, relate only to certain indispensable acts specified in the schedule thereto, and consequently that the parties were left free to contract in reference to any other expenses of realization which might be shewn to be reasonable and necessary and no ground had been shewn for imposing the penalty which their Lordships held was permissive and not imperative, since the defendants had acted reasonably and prudently. Thirdly, with regard to the question of interest, which the Supreme Court of Canada had allowed at 7%, their Lordships held that the stipulation for payment of 8% was inoperative under the Bank Act, R.S.C. 1906, c. 29, s. 91, and therefore as no rate had been fixed, only the legal rate of 5% was recoverable, but that the plaintiffs were not entitled to recover back the excess which they had voluntarily paid.

RELIEF AGAINST FORFEITURE—CONTRACT FOR SALE OF LAND—FORFEITURE ON DEFAULT OF PAYMENT OF ANY INSTALMENT OF PURCHASE MONEY—SPECIFIC PERFORMANCE—TIME OF ESSENCE OF CONTRACT.

Kilmer v. *British Columbia Orchard Lands* (1913) A.C. 319. This was an appeal from the Court of Appeal of British Columbia. The plaintiffs had entered into an agreement to sell land to the defendant, the purchase money to be paid in instalments, and the contract provided that in case default should be made in payment of any instalment, the agreement and all past payments should be forfeited, and time was declared to be of the essence of the contract. The defendant having made default in the payment of an instalment of purchase money, the plaintiffs brought the action claiming a declaration that their agreement of sale to the defendant was null and void. The defendant counter-claimed for specific performance, and at the trial obtained leave to pay into court the amount due to the company. The judge at the trial dismissed the plaintiff's action and decreed specific performance, but the Court of Appeal of British Columbia set his judgment aside and gave judgment for the plaintiffs. The Judicial Committee of the Privy Council (Lords Macnaghten, Atkinson, and Moulton) have reversed the latter decision and restored the judgment at the trial, holding that the condition of forfeiture was in the nature of a penalty from which the defendant was entitled to be relieved on payment of the purchase money due.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

Ont.] [May 6.

McGUIRE *v.* OTTAWA WINE VAULT CO.

Fraudulent conveyance—Statute of Elizabeth—Husband and wife—Voluntary settlement—Evidence.

In August, 1908, M. and his brother bought a hotel business in Ottawa for $8,000, paying $6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed a hotel property in Madoc to his wife, subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors who brought suit to set aside the conveyance to M.'s wife. On the trial, it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property, which she had helped him to acquire, as a provision for herself and their children; that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the License Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make expensive alterations; and to a fire on the premises early in 1910. The trial judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L.R. 591), but restored by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (27 O.L.R. 319), Davies, J., dissenting, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was void as against his present creditors.

Appeal dismissed with costs.

Proctor, for appellant. *Hog,* K.C., for respondents.

Ont.] [May 6.

PETERS *v.* SINCLAIR

Trespass—Easement — Public way—Dedication — User—Prescription.

S. brought action against P. for trespass on a lane called Ancroft place which he claimed as his property and asked for damages and an injunction. Said lane was a *cul-de-sac* running from Sherbourne street on the west, and the defence to the action was that it was a public street or, if not, that P. had a right-of-way over it either by grant or user. On the trial it was shewn that the original owners had conveyed the lots to the east and south of Ancroft place to different parties, each deed giving a right-of-way over it to the grantee and to those to whom the owner had conveyed or might thereafter convey the lot to the north (now P.'s land). The deed to P.'s predecessor in title did not give him a similar right-of-way. The deed to the predecessor in title of S. had a plan annexed shewing Ancroft place as a street fifty feet wide and the grantee was given the right to register said plan with the deed. The evidence also established that for several years before the action Ancroft place had not been assessed, and that the city had placed a gas lamp on the end near Sherbourne street; also, that for over twenty years it had been used by the owner of the lot to the north, and by the owners of adjoining lots, as a means of access to, and egress from, their respective properties. In 1909 the fee in the lane was conveyed to S. who had become owner of the lots to the east and south.

Held, 1. Idington, J., dissenting, that the evidence was not sufficient to establish that the lane had been dedicated to the public and accepted by the municipality as a street.

2. Idington, J., and Duff, J., dissenting. The lane was not a "way, easement or appurtenance" to the lot to the north "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof," within the meaning of sec. 12 of the Law and Transfer of Property Act, R.S.O. (1897), ch. 119.

3. That P. had not acquired a right-of-way by a grant implied from the terms of the deeds of the adjoining lots nor by prescription.

Appeal dismissed with costs.

Tilley, and *J. D. Montgomery,* for appellant. *Ludwig,* K.C., for respondent.

Province of Ontario.

SUPREME COURT, APPELLATE DIVISION.

Garrow, Maclaren, Meredith, and Magee, JJ.A., and Lennox, J.] [April 22.

McKENZIE *v.* ELLIOTT.

(10 D.L.R. 466.)

Appeal—Findings by referee—Reconsideration on appeal as to inferences from surrounding facts—Evidence—Variation.

Held, 1. While a referee hearing the witnesses has the better opportunity for forming a right judgment upon the credibility of witnesses as affected by their demeanour in giving evidence and his finding where based upon credibility will not ordinarily be disturbed by an appellate court, the rule does not apply to the consideration of the weight to be given the evidence as affected by the surrounding circumstances and attendant facts; an appellate court should draw its own conclusions in regard to the probabilities and inferences to be drawn from such facts and circumstances.

2. In an action upon a building contract where the construction actually proceeded with differed from that contemplated by the written contract between the parties as to size of building and class of materials, the party who claims that the written contract was altogether abrogated and not merely varied in such respects by the verbal arrangement between the parties by which the change was assented to after the contract was made, has the onus cast upon him to prove such claim.

McKenzie v. *Elliott*, 2 D.L.R. 899, affirmed on appeal.

Hellmuth, K.C., and *W. Mulock*, for plaintiff. *Anglin*, K.C., and *J. Shilton*, for defendant.

SUPREME COURT.

Middleton, J.] [April 14.

ROBERTS *v.* BELL TELEPHONE CO. AND WESTERN COUNTIES ELECTRIC CO.

(10 D.L.R. 459.)

Electricity—Injury by wires in streets—Dangerous agency doctrine—Effect of—Statutory authority—Proximate cause.

Held, 1. The effect of conferring statutory authority upon

an electric power company to erect poles and power wires on a highway is that, apart from negligence, the company is absolved from the rule that any one who, for his own purposes, collects or keeps anything likely to do mischief if it escapes, is *primâ facie* answerable for all the damages which are the natural consequences of its escape.

Fletcher v. *Rylands,* L.R. 1 Ex. 265, and *Rylands* v. *Fletcher,* L.R. 3 H.L. 330, considered; *National Telephone Co.* v. *Baker,* [1893] 2 Ch. 186, and *Eastern and South African Telegraph Co.* v. *Cape Town Tramways Co.,* [1902] A.C. 381, referred to.

2. An electric power company stringing its wires by statutory authority upon the public streets at a time when no other wires were there, is under no duty to inspect the wires periodically for the purpose of seeing that no other wires had subsequently been placed in too close proximity to their own wires and so avoiding injuries which might result to persons handling the dead wires of another company should the latter become charged by close contact with the power wires.

3. A telephone company empowered to erect its poles and wires on a street upon which the poles and wires of an electric power line are already strung is under a duty to string the telephone wires at a safe distance from the power wires, and where a telephone lineman is killed by the telephone wires with which he was working becoming charged by contact with an electric wire which had sagged low by the settlement or bending of the electric company's poles not resulting from any negligence on the part of the electric company, the proximate cause of the injury is the negligence of the telephone company and not of the electric company, although the latter had taken no precautions by guy wires or otherwise to obviate the effect of such sagging.

Englehart v. *Farrant,* [1897] 1 Q.B. 240; *McDowell* v. *Great Western R. Co.,* [1902] 1 K.B. 618; *Dominion Natural Gas Co.* v. *Collins,* [1909] A.C. 640, and *Lothian* v. *Richards,* 12 C.L.R. 165, referred to.

G. S. Kerr, K.C., and *G. C. Thomson,* for plaintiff. *M. J. O'Reilly,* K.C., for Western Counties Electric Company.

Middleton, J.] [May 2.

GODSON *v.* MCLEOD.

(10 D.L.R. 519.)

Contracts—Nature and requisites—Sufficiency of acceptance—Adding a term to the offer.

Where a written contract is expressed in such general or ambiguous terms as to admit of different constructions, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party and to claim that there is no real agreement between them, though the written contract must be applied if possible; so where the offer was made by letter for the sale of machinery "in place," the latter phrase being intended by the seller to indicate that delivery must be taken by the buyer of the machinery where it stood, and this interpretation was consistent with the preliminary negotiations, and the proposed buyer replied by letter purporting to accept, but adding that "in place" was considered to mean on board a railway car and that advice would be sent as to the destination to which it should be shipped, the seller properly treats the added words as an attempt to impose upon him the duty of loading on the car, and may decline to consider the alleged acceptance as any acceptance in fact.

Haverson, K.C., for plaintiffs. *Britton Osler*, for defendants.

Province of Quebec.

COURT OF REVIEW.

McDougall, and Chauvin, JJ.] [May 7.

WONG LING *v.* CITY OF MONTREAL.

(10 D.L.R. 558.)

Municipal law—Highways—Injuries from defects—Defective crossing place.

While a city municipality is not obliged to keep the whole street surface in a condition safe for foot passengers, yet, if it

so deals with a portion of the street adjoining a public building as to invite the public to use that part of the street as a crossing place for foot passengers, the city is under an obligation to make it safe for that purpose, although the place so used is not a continuation of any sidewalk and was not paved in the manner usual for street crossings in that locality.

See also *Breen* v. *City of Toronto,* 2 O.W.N. 690; *Brown* v. *City of Toronto,* 2 O.W.N. 982; *Lowery* v. *Walker,* 27 Times L.R. 83 (H.L.); *City of Vancouver* v. *Cummings,* 2 D.L.R. 253, 45 S.C.R. 194.

R. T. Stackhouse, for plaintiff, appellant. *J. A. Jarry,* K.C., for city, respondent.

Province of British Columbia

SUPREME COURT.

Gregory, J.] [March 14.

BALAGNO v. LEROY.

(10 D.L.R. 601.)

Landlord and tenant—Forfeiture of lease—Waiver—Non-payment of rent—Relief—Usage.

Held, 1. A failure on the part of the lessor to re-enter the demised premises and to declare a forfeiture under the terms of the covenant for non-payment of rent, does not constitute such a waiver of rights as is contemplated by sub-sec. 17 of sec. 2 of the Laws Declaratory Act, R.S.B.C. 1911, ch. 133, to the effect that no relief shall be granted against forfeiture of a lessee's term where a forfeiture under the covenant in respect of which relief is sought "shall have been already waived out of court in favour of the person seeking the relief," so as to preclude the lessee from maintaining a summons for relief against such forfeiture.

2. A lessee of demised premises is entitled to an order for relief against forfeiture on the ground of non-payment of rent, under the Laws Declaratory Act, sec. 2, sub-sec. 14 (B.C.), where it appears that he had been in the habit of paying several months' rent at a time instead of monthly as called for by the lease, with which arrangements the lessor seemed to have been satisfied, that no request for payment was made by the

lessor for about five months, but instead thereof he served his notice of re-entry, at which time the lessee tendered all the rent then due, but the lessor would not accept it, and where the lessee brings into court all arrears of rent due under the lease.

H. B. Robertson, for plaintiff. *Higgins*, for defendant.

ANNOTATION ON THE ABOVE CASE AS TO FORFEITURE OF LEASE AND WAIVER.

Where a forfeiture has been incurred, it is in the option of the landlord whether he will take advantage of it or not, even where, under a proviso, the lease is declared to be wholly void. In such a case the lease does not become void on breach of the covenant or condition, but only voidable, and the landlord may enforce the forfeiture or he may waive it, either expressly or by implication from his acts. Any act by which he recognizes the tenancy as still subsisting after the breach which gives rise to the forfeiture comes to his knowledge, amounts to a waiver, or is evidence from which an intention to waive the forfeiture may be inferred: *Roe* v. *Harrison* (1788), 2 T.R. 425, 1 R.R. 513; *Evans* v. *Wyatt* (1880), 43 L.T. 176. But actual knowledge of the breach is necessary before any act can amount to a waiver, and constructive notice, or means of knowledge is insufficient: *Ewart* v. *Fryer* (1900), 17 Times L.R. 145, 82 L.T. 415.

If, however, the lessor does nothing, and is merely aware that a breach of a covenant has been committed, he is not thereby disentitled to claim a forfeiture, as mere knowledge, without any positive assent, is not sufficient to constitute a waiver: *Doe* v. *Allen* (1810), 3 Taunt. 78, 12 R.R. 597. Mere knowledge or acquiescence in an act constituting a forfeiture, does not amount to a waiver; there must be some positive act of waiver, such as a receipt of rent: *McLaren* v. *Kerr* (1878), 39 U.C.R. 507. It would seem to be no waiver of the breach of a covenant not to dig beyond a prescribed depth, that the landlord, though aware of such breach, and threatening to take proceedings in consequence, did not take any steps at the time, but allowed the tenant to remain in possession until his subsequent insolvency: *Kerr* v. *Hastings* (1875), 25 U.C.C.P. 429.

If a person entitled to the reversion, knowing that a forfeiture has been incurred by breach of the covenant or condition, does any act whereby he acknowledges the continuance of the tenancy at the later period, he thereby waives the forfeiture: *Dendy* v. *Nicholl* (1858), 27 L.J.C.P. 220, 4 C.B.N.S. 376; *Penton* v. *Barnett*, [1898] 1 Q.B. 276. A right of entry, for breach of covenant in a lease, is waived by the lessor bringing an action for rent accrued due subsequent to the breach: *Ibid.* A forfeiture is waived where the landlord expressly declares to the tenant that he will not enforce it: *Ward* v. *Day* (1864), 5 B. & S. 359. So, if he agrees to grant a new lease to the tenant on the expiration of the old one: *Ibid.*; or if he notifies the tenant to do repairs under the lease: *Griffin* v. *Tomkins* (1880), 42 L.T. 369. So, where the landlord accepts rent from the lessee which became due after the forfeiture was incurred, it amounts to a waiver: *Doe*

v. *Rees* (1838), 4 Bing. N.C. 384; *Keith* v. *National Telephone Co.*, [1894] 2 Ch. 147; *Roe* v. *Southard* (1861), 10 U.C.C.P. 488, although the landlord protests that such acceptance is without prejudice to his right to insist on the forfeiture: *Davenport* v. *The Queen* (1877), 3 App. Cas. 115; *Croft* v. *Lumley* (1858), 6 H.L.C. 72. So, where the landlord makes an unqualified demand on the tenant for rent due after the forfeiture: *Doe* v. *Birch* (1836), 1 M. & W. 402, 46 R.R. 326, or sues him for such rent: *Dendy* v. *Nicholl* (1858), 4 C.B.N.S. 376, it amounts to a waiver. In like manner, a distress for rent after the forfeiture is incurred, whether such rent became due before or after the forfeiture, operates as a waiver: *Cotesworth* v. *Spokes* (1861), 10 C.B.N.S. 103. But acceptance after forfeiture of rent which became due before the forfeiture, is not sufficient to constitute a waiver: *Price* v. *Worwood* (1859), 4 H. & N. 512; *Dobson* v. *Southeran* (1888), 15 Ont. R. 15.

Where the landlord credits moneys received on a note given by the tenant for previous arrears of rent, it was held to be no waiver of a forfeiture arising in respect of rent accruing after the note was given: *McDonald* v. *Peck* (1859), 17 U.C.R. 270.

In an action to recover possession on the ground of forfeiture for breach of covenants, and to recover arrears of rent, acceptance by the landlord of the sum paid into Court by the defendant in satisfaction of the rent, is not a waiver of a breach of covenant which took place after the rent became due: *Toogood* v. *Mills* (1896), 23 V.L.R. 106. A reference to arbitration after default operates in the meanwhile as a suspension of the right of re-entry: *Black* v. *Allen* (1867), 17 U.C.C.P. 240.

A lease to a joint stock company provided that in case the lessee should assign for the benefit of creditors, six months' rent should immediately become due and the lease should be forfeited and void. The two lessors were principal shareholders in the company, and while the lease was in force one of them, at a meeting of the directors, moved, and the other seconded, that a by-law be passed authorizing the company to make an assignment which was afterwards done, the lessors executing the assignment as creditors assenting thereto. It was held that the lessors and the company were distinct legal persons and the individual interests of the lessors were not affected by their action as shareholders or directors of the company, and the lessors were not estopped from taking advantage of the forfeiture clause: *Soper* v. *Littlejohn* (1901), 31 Can. S.C.R. 572, following *Salomon* v. *Salomon*, [1897] App. Cas. 22.

Where, however, the act or omission which constitutes the breach of a covenant and occasions the forfeiture, is of a continuing nature, these acts of the landlord operate as a waiver only to a limited extent. Thus, acceptance of rent in the case of a continuing breach is a waiver down to the time such rent is received, but not afterwards: *Doe* v. *Gladwin* (1845), 6 Q.B. 953. So, a distress is a waiver of a continuing breach down to the time the distress is made: *Thomas* v. *Lulham*, [1895] 2 Q.B. 400.

It has been held that covenants to repair, to insure, to cultivate or use the premises in a particular manner, are continuing covenants, and the

omission to observe them is a continuing breach: *Doe* v. *Jones* (1850), 5 Ex. 498; *Coward* v. *Gregory* (1866), L.R. 2 C.P. 153; *Coatsworth* v. *Johnson* (1886), 54 L.T. 520; *Doe* v. *Woodbridge* (1829), 9 B. & C. 376. Breaches of a covenant in a farm lease to keep the fences in repair, and to keep eighteen acres in meadow during the term, are continuing breaches, and the right to re-enter for them is not waived by acceptance of rent: *Ainley* v. *Balsden* (1857), 14 U.C.R. 535.

A covenant which requires the complete performance of a definite act within a specified time, is not a continuing covenant: *Morris* v. *Kennedy*, [1896] 2 I.R. 247. Thus, a covenant to build within a specified time is not such a covenant: *Jacob* v. *Down*, [1900] 2 Ch. 156. Where the lessee covenanted to build a house within four years and failed to perform it, it was held that the receipt of rent by the lessor after that time was a waiver of the forfeiture: *Roe* v. *Southard* (1861), 10 U.C.C.P. 488. But the forfeiture on a breach of a covenant, the necessary effect of which, although a continuing breach, is to put it out of the lessee's power to remedy it, may be completely waived. Thus, where a landlord accepts or distrains for rent, after and with knowledge of a breach of a covenant against sub-letting, it operates as a complete waiver during the whole term of such sub-letting, but not afterwards; *Walrond* v. *Hawkins* (1875), L.R. 10 C.P. 342; *Lawrie* v. *Lees* (1881), 14 Ch. D. 249, 7 App. Cas. 19.

A demand of rent falling due after a notice to repair has expired, does not operate as a waiver, if there be subsequent non-repair: *Penton* v. *Barnett*, [1898] 1 Q.B. 276. Acceptance of rent which becomes due pending a notice to repair, is no waiver of a forfeiture on the expiry of the notice. And an agreement to allow further time for the repairs is not a waiver of, but only suspends the right of entry: *Doe* v. *Brindley* (1832), 4 B. & Ad. 84.

Where, however, the landlord elects to claim the forfeiture, and brings an action of ejectment, nothing that he may then do will be construed as a waiver of the forfeiture. Thus, neither acceptance of rent, nor his distraining for it, will operate as a waiver. An election to forfeit once made by bringing action, is irrevocable: *Doe* v. *Meux* (1824), 1 C. & P. 346; *Jones* v. *Carter* (1846), 15 M. & W. 718; *Grimwood* v. *Moss* (1872), L.R. 7 C.P. 360. Where the right to re-enter has arisen on the bankruptcy of the lessee, the annulment of the bankruptcy after the issue of the writ in ejectment will not defeat the forfeiture: *Smith* v. *Gronow*, [1891] 2 Q.B. 394.

But if a claim is made in the writ for an injunction to restrain the breach giving rise to the forfeiture, in addition to the claim for possession, or if the lessor in his pleading treats the tenancy as subsisting, it has been held to operate as a waiver: *Evans* v. *Davis* (1878), 10 Ch. D. 747; *Holman* v. *Know*, 3 D.L.R. 207.

The action of ejectment shews an irrevocable intention on the part of the landlord to avoid the lease. Acceptance of rent, after the issue of the writ, will not operate as a waiver, nor set up the former tenancy, but it may be regarded as evidence of a new tenancy on the same terms from year to year: *Evans* v. *Wyatt* (1880), 43 L.T. 176. Thus, where a landlord, after an action of ejectment was commenced for the forfeiture of the

lease, distrained for and received rent subsequently accruing due, it was held that such course did not, *per se*, set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year: *McMullen* v. *Vannatto* (1893), 24 Ont. R. 625.

In Ontario it is provided by statute that a waiver of the benefit of a covenant or condition in a lease shall not be deemed to extend to any instance or breach thereof, other than that to which it specially relates, unless a contrary intention appears. This is enacted by section 16 of the Landlord and Tenant Act, R.S.O. 1897, ch. 170.

A waiver of a forfeiture made by the beneficial owner of unpatented land under lease, is binding on the purchaser who afterwards obtains a patent with notice of the lease: *Flower* v. *Duncan* (1867), 13 Gr. 242.

It has been held that where the action is against defendant as plaintiff's tenant for a forfeiture, the receiving of rent after the writ of possession has issued, is a waiver of the execution: *Bleecker* v. *Campbell* (1857), 4 C.L.J. (O.S.) 136. There can be no waiver after entry for a forfeiture: *Thompson* v. *Baskerville* (1879), 40 U.C.R. 614.

The landlord's conduct in permitting his tenant's assignee of the term to take possession and in accepting payment of his rent from the latter without claiming any forfeiture and his objection to signing a written consent to the transfer on the ground that it was not necessary, will amount to a waiver of a covenant which requires a written consent to the assignment of a lease: *Minuk* v. *White* (1905), 1 W.L.R. 401 (Man.).

The plaintiff's deceased testator in his lifetime leased to the defendant the Royal Hotel Block, consisting of an hotel, barber shop, stores, offices and stable, for a term of years. The lease contained lessee's covenants not to sell, assign, let or otherwise part with the demised premises without leave in writing and not to alter the premises without leave in writing. The lessor roomed in the hotel and usually took his meals there. During his lifetime certain alterations were made in the premises and other alterations were commenced, without his written consent, but with his knowledge and implied consent and acquiescence, and after his death the alterations were continued, with the knowledge of the plaintiff. One sub-tenant had without leave in writing from the head lessor assigned his lease. In the case of two other sub-leases the rent had been increased without consent, and in respect of another a monthly tenancy on a verbal lease had been changed without consent to a two-years' term, with a lease in writing, at a higher rent. The dining-room of the hotel had been placed under separate management on an agreement that the manager should pay defendant a fixed sum of the income from the dining-room and should be entitled to the balance earned by the dining-room. In an action by the executor of the lessor against the lessee claiming forfeiture of the lease on account of the breach of covenants, the Court held that (1) an assignment without consent by a sub-lessee of his lease which has been granted with consent is no breach of the lessee's covenant in the head lease not to assign without leave. (2) The mere increase in

the monthly rental payable by a sub-lessee is not a termination of one tenancy and the creation of a new tenancy, and will, therefore, not be a breach of the covenant in the head lease not to sub-let, etc., if done without consent. (3) The alteration of a monthly tenancy to a two years' term on a written lease without such consent is a breach of the covenant. (4) The agreement with the dining-room manager was not a lease, sale or assignment, and, therefore, no breach. (5) Under the circumstances the Court should exercise the jurisdiction to relieve against forfeitures on terms. The terms imposed were increased rent to make up the increase obtained from the new tenancy created by the conversion of the monthly tenancy to a two years' tenancy, and the defendant was required to execute a lease covenanting to pay to the plaintiff such increased amount, and was also required to pay the plaintiff's costs as between solicitor and client within one month. *Quære*, whether the plaintiff was estopped from taking advantage of the condition for forfeiture in respect of alterations authorized verbally by the testator in his lifetime, but executed after his death: *Royal Trust Co.* v. *Bell*, 2 Alta. R. 425.

The right of re-entry under the Act respecting Short Forms of Lease applies to the breach of a negative as well as of an affirmative covenant, so that there is a right of re-entry for breach of the covenant not to assign or sub-let without leave: *Toronto General Hospital* v. *Denham* (1880), 31 U.C.C.P. 207. The making of an agreement for the assignment of a lease the settlement of the terms thereof and the taking of possession by the assignee, constitute sufficient evidence of the breach of such covenant; the fact of the document shewing the transfer not having been made until after action brought is immaterial: *McMahon* v. *Coyle*, 5 O.L.R. 618 (Boyd, C.).

Plaintiff, as lessee, and defendant, as lessor, on the 1st of January, 1906, entered into a lease for a term of five years, at a rental of $70 per month, in advance, with a proviso for forfeiture and re-entry after 15 days' default in payment of rent, together with an exclusive option of purchase on terms named. Plaintiff being absent in December, 1906, and up to the 23rd of January, 1907, inadvertently allowed the rent for January to fall in arrear, but on the latter date, tendered defendant, through her solicitor, she herself being inaccessible, the rent for January and February, and also offered to defray any costs incurred. Defendant had in the meantime, through her bailiff, taken and retained possession. There was evidence of an oral arrangement that in the event of the plaintiff's absence at any time the forfeiture clause for non-payment in advance would not be enforced. No third party interests having intervened, plaintiff was entitled to relief against forfeiture, both as to the term and the option, and that, the case coming within Rule 976 of the B.C. Supreme Court Rules, 1906, plaintiff should also get the costs of the action: *Huntting* v. *McAdam*, 13 B.C.R. 426; *Newbolt* v. *Bingham* (1895), 72 L.T.N.S. 852.

A provision in a lease against sub-letting without the written consent of the lessor is not *de rigueur* so as to prevent the lessor pleading a verbal consent to an action under the Quebec law to resiliate the lease for breach of this provision brought by an assignee of the lessor. Oral evidence by the

lessor of such consent prior to the sale of the immovable to the plaintiff, coupled with the implied consent of the latter to the sub-lease resulting from the fact that he was aware of it for several months without taking action is sufficient: *Vaillancourt* v. *Saint Denis*, Q.R. 34 S.C. 25; *Jilbert* v. *Bowen*, Q.R. 36 S.C. 309.

Where a lease contains a covenant not to assign without lessor's consent and an assignment of the lessee's interest in the lease is made, and thereafter the lessor assigns his title, and the lessor's assignee, subsequently learning of the prior assignment by the lessee, accepts rent from the party in possession under the lessee, and later distrained on his goods for other rent, and makes no re-entry, the breach of the covenant not to assign is waived: *Pigeon* v. *Preston* (No. 3), 8 D.L.R. 126, 22 W.L.R. 894, 49 C.L.J. 76.

A forfeiture for breach of covenant in a lease (except for payment of rent) cannot be enforced by action, or otherwise until after a notice has been served pursuant to sec. 20 (2) of the Ontario Landlord and Tenant Act; this provision is general and applies to both positive and negative covenants: *Harman* v. *Ainslie*, [1904] 1 K.B. 698; *Walters* v. *Wylie*, 1 D.L.R. 208, 3 O.W.N. 567, 20 O.W.R. 994.

A forfeiture in a lease is waived if the lessor elects not to take advantage of it and shews his election either expressly by a statement to that effect to the lessee or impliedly by acknowledging the continuous tenancy, and if after a cause of forfeiture has come to his knowledge he does anything to recognize the relation of landlord and tenant as still subsisting, he is precluded from saying he did not do the act with the intention of waiving the forfeiture: *Evans* v. *Davis* (1878), 10 Ch. D. 747; *Moore* v. *Ulleoats Mining Co.*, [1908] 1 Ch. 575; *Holman* v. *Knox*, 3 D.L.R. 207, 3 O.W.N. 745, 25 O.L.R. 588, 21 O.W.R. 325.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott, Stuart, Simmons, and Walsh, JJ.] [March 31.

REX *v.* HURD.

(10 D.L.R. 475.)

Criminal law—Evidence—Trial — Confessions — Subordinate fact—Cross-examination of accused.

Held, 1. An acknowledgment of a subordinate fact not directly involving guilt and not essential to the crime charged is

not a "confession" within the rules by which evidence of a statement by way of confession made to a person in authority may be received only where shewn to have been made freely and voluntarily.

Wigmore on Evidence, sec. 821, approved.

2. Where questions are put to the accused by the Crown counsel in cross-examination when the accused becomes a witness on his own behalf and such questions overstep the bounds allowable in cross-examination as making suggestions not warranted by the evidence and from which the jury might draw inferences prejudicial to the accused, the validity of the conviction will not be affected thereby if the trial judge has instructed the jury to disregard those questions and any inferences suggested by them.

R. v. *Long*, 5 Can. Cr. Cas. 493; *R.* v. *Rose*, 18 Cox C.C. 717; *R.* v. *Bridgewater*, [1905] 1 K.B. 131; and *R* v. *Hudson*, [1912] 2 K.B. 464, 7 Cr. App. R. 256, referred to.

F. E. Eaton, for the accused. *L. F. Clarry*, and *G. P. O. Fenwick*, for the Crown.

Book Reviews.

The Canadian Criminal Law Digest. Being a consolidated Digest of the cases under the Criminal Code reported in vols. 1 to 20, inclusive, of CANADIAN CRIMINAL CASES, 1893-1913. Toronto: Canada Law Book Co. 1913.

The above excellent series of reports is so well known to our readers as to need no words of commendation from us. But it would be of little use to a busy practitioner if the law therein contained were not readily obtainable. To meet this requirement and to keep the 20 volumes which have been issued, under one uniform system with a ready key thereto, this digest has been compiled.

In addition to the numerous cases to be found in these 20 volumes, a large number of criminal cases decided in Canada prior to the commencement of the above series of reports, have been carefully selected as being still of value as precedents since the enactment of the Criminal Code of 1892. To these are also added a large number of cases for offences under the liquor

laws and other Provincial statutes. The digest, therefore, is not only an index to the Canadian Criminal Cases, but contains a classified collection of important decisions on criminal and quasi-criminal law, heretofore available only after long research in the other Canadian Reports.

This statement tells its own story as to the great value of this Digest. It may almost be said to be a complete text-book of the Criminal Law of Canada, and we venture to think much more valuable than are some of such text-books.

The titles and arrangement of the matter shews that the compiler is no novice in criminal law and the typographical execution is of the very best.

Mechanics' Lien Laws in Canada. By His Honour WILLIAM BERNARD WALLACE, LL.B., County Judge, Nova Scotia. Toronto: Canada Law Book Co. 1913.

This is a second edition of Judge Wallace's most excellent work on this subject; the most useful of all, in our opinion at least, so far as Canada is concerned.

This second edition gives us the Acts of the various Provinces of the Dominion, including the articles of the Quebec Civil Code dealing with the subject, together with references to numerous judicial decisions, and luminous annotations explanatory of the legislation.

Since the first edition in 1905 many important amendments have been made to the various Mechanics' Lien Acts of the various Provinces of the Dominion, and much judicial discussion has taken place in relation thereto. These are noted in the volume before us. As explained in his first edition, much light is thrown upon this difficult branch of the law by the United States decisions, and the author, as well as others familiar with the subject, recognise that, whilst these authorities are not binding, they should not be ignored.

The author points out the difficulty of grouping the cases according to any logical scheme of classification owing to the difference in the law of the various provinces and the legislation in other countries, all differing in many particulars from the Canadian law.

Special reference is also made to *Ward* v. *Serrell* (1910), 3 Alta. L.R. 141, where Mr. Justice Beck states, that where a statutory provision is adopted from another jurisdiction after having been in force there for some time, he would follow the decisions of that jurisdiction upon its interpretation unless

there were strong reasons to the contrary. This common sense and commendable attitude, if generally followed, would help to secure uniformity in the practical operation of much inconsistent legislation.

We have no hesitation in recommending this book to our readers.

Chitty's Statutes of Practical Utility. With notes and indices. By W. H. Aggs, Barrister-at-law. London: Sweet & Maxwell, 3 Chancery Lane, and Stevens & Sons, 119 Chancery Lane. 1913.

This continuation of this well known and venerable publication brings the Imperial statutes down to March, 1913. In the preface the editor draws special attention to the Trade Union Act, 1913, passed in consequence of the case of *Amalgamated Society of Railway Servants* v. *Osborne,* 1910, A.C. 87, and which gives legislative sanction to certain dealings of Trade Unions. Another interesting statute, also referred to, is the Criminal Law Amendment Act, 1912, which was passed to strengthen the hands of the authorities in dealing with the "White Slave Traffic," and the attempt to lessen certain criminal offences by the application of the lash. Solomon after all is not quite out of date.

Students' Leading Cases and Statutes on International Law. Arranged and edited, with notes, by Norman Bentwich, Barrister-at-law; with an introductory note by Prof. L. Oppenheim. London: Sweet & Maxwell, Limited, 3 Chancery Lane. 1913.

The names connected with this book are a sufficient guarantee of its excellence. It does not pretend to be a full text book on this important branch of law, but it is most valuable for students who should become acquainted as early as possible with the way in which questions of International Law are dealt with by the courts, studying not only the results of the cases, but the methods by which the results are reached. Professor Oppenheim, in his introductory note, makes this pertinent observation as to a book of this kind: "The study of practical cases enlivens the abstract rules which are taught in lectures and books. The cases, so to say, supply the flesh for the skeleton offered by lectures and treatises." The selection is made principally from English cases, American cases being used to supplement or fill

gaps in the chain of English authorities. The cases are classified in groups under the various appropriate headings. Part I. deals with the Law of Peace, Part II. with the Law of War, with subdivisions in each.

The Law of Arbitration and Award. By JOSHUA SLATER, Barrister-at-law. 5th edition, by ALBERT CREW, Barrister-at-law. London: Stevens & Haynes, law publishers, Temple Bar. 1913.

This compact summary of the law in relation to arbitrations is primarily intended for the use of commercial men, but has also been found useful for students, to whom it will give an interesting introduction to works of larger volume.

Justice and the Modern Law. By EVERETT V. ABBOTT, of the New York Bar. Boston and New York; Houghton Mifflin & Co. 1913.

As the name and size of the volume (300 pages) indicates, this is necessarily a sketch, but an interesting one, setting forth the ethical principles of the law, as it has been, and as it is in modern days, and as now practised and administered; together with a discussion on the rule of stare decisis; the writer concluding with some observations based on his thought that the United States is now able to have an ideal system of justice. A pleasant dream, but not likely to be realised, we fear, until the Millenium.

Bench and Bar

JUDICIAL CHANGES IN ENGLAND.

Although the announcement was not unexpected, the whole Profession will have received with regret the news of the resignation of Lord Justice Farwell in consequence of ill-health, and his retirement from the Bench is a serious loss. It is to be hoped that no time will be lost in filling the vacancy thus created, for the work of the Court of Appeal is badly in arrear, and the services of Sir S. T. Evans or of a King's Bench judge cannot be dispensed with in their respective divisions.

That Mr. J. R. Atkin, K.C., was strongly in the running for the Bench was well known,, and his selection for the appoint-

ment as the additional judge of the King's Bench Division will be unanimously approved. Although young—we believe he is but forty-six years of age—he possesses in a marked degree those attributes which go to make a good judge, and we feel sure that the future will amply justify his promotion.—*Law Times.*

County Judges take Notice!

Mr. A. and Mr. B., two solicitors of one of the county towns of Ontario, having an appointment for a certain day before the Surrogate Court judge, discovered on arriving that the judge was in the middle of another matter which had the appearance of being lengthy.

The proceedings were being carried on in the Judge's Chambers, and the two solicitors took seats at the end of the table. By-and-by Mr. A. leaned over to Mr. B. and remarked, in a whisper, "This seems rather hopeless. It looks to me as though the only thing to do would be to reprimand the judge, and get another day fixed."

Some whispered conversation then took place between the two solicitors, when it was arranged that Mr. B. should see the judge later and have a new day appointed.

At this moment the judge's voice was heard remarking, "I really cannot hear what the witness says while those two gentlemen at the end of the table are talking."

Mr. A. promptly rose to his feet, and bowing to the judge, said: "I am extremely sorry, your honour, to have been a disturbing element. I was only remarking to my learned friend that it was a curious thing that judges should give appointments for a certain hour and then take up and proceed with other business."

Canada Law Journal.

VOL. XLIX. TORONTO, JULY. Nos. 13 and 14

ETIQUETTE OF THE BAR.

DUTIES OF COUNSEL AS TO THE ACCEPTANCE OR REFUSAL OF BRIEFS.

A discussion, rather than a controversy, has been going on in London in which leading members of the profession have taken part regarding the action of Sir Edward Carson and Mr. F. E. Smith, K.C., in acting as counsel for the Attorney-General and the Chancellor of the Exchequer before the Marconi investigation committee. Both the gentlemen named are leaders of the Bar; both are also leaders of the Unionist party in Parliament where the report of the committee would necessarily come up for discussion and criticism. The question at issue is—were the circumstances such as would justify counsel in refusing to follow the universal rule by which they are bound to accept briefs offered to them, no matter by whom. As counsel for the defendants their duty would be clear. As members of Parliament their first duty was to those whom they represented before that, the highest court of the realm. Was it possible for the same men to occupy these two apparently irreconcilable positions?

In an article in the *Times*, the leading exponent of public opinion, the following passage appeared: "The etiquette of the Bar, we are told by some of its members, left these counsel (Sir Edward Carson and Mr. F. E. Smith) no choice; they could not refuse briefs delivered to them; they acted in accordance with a laudable practice and tradition which gives all comers the service of eminent advocates."

Commenting on this Sir Harry Poland, an eminent authority, says in a letter to the *Times*:—

"There can be no doubt that this is not the etiquette of the Bar. These eminent advocates were absolutely free to refuse briefs in the *Marconi* case, and in the prosecution of Mr. Chester-

ton by Mr. Godfrey Isaacs, if they thought that appearance in such cases would interfere with their duty in Parliament to their constituents."

The same authority goes on to say that, having accepted briefs in these Marconi cases, the gentlemen named could not take part in any debates or divisions in the House of Commons on the report of the Marconi committee, and apparently they did not.

The same writer says again:—

"There are, of course, some cases in which counsel is bound in honour to appear for a client. Let me give an instance. Tom Paine was in 1792 prosecuted for a seditious libel—the first part of the 'Rights of Man'—and Erskine was retained for the defence. He was then Attorney-General to the Prince of Wales. Every effort was made to induce Erskine not to appear for the defendant. In his speech for the defence he referred 'to the calumnious clamour that by every art has been raised and kept up against me.' Then he went on to say:—

" 'Little, indeed, did they know me who thought that such calumnies would influence my conduct. I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which impartial justice, the most valuable part of the English constitution, can have no existence. From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of the English law makes all presumptions, and which commands the very judge to be his counsel.' (State Trials, vol. 22, p. 411.)

"Erskine for his brave and honest defence was removed from his office of Attorney-General to the Prince of Wales."

Mr. Justice Neville, writing on the same subject, says:—

"Will you allow me, as a barrister of over 40 years' standing (we do not cease to be members of the Bar when we sit upon the Bench, though our rights are in suspension), to express my complete concurrence with the view stated by Sir Edward Carson?

"It is in accordance with the principles instilled into me in my youth, and follows, I believe, the best traditions of the Bar.

"To my mind the question raised is no mere question of etiquette, but one which affects the existence of the Bar, holding, as it does, the exclusive right of audience before the Superior Courts in the country."

Mr. F. E. Smith in a long letter to the *Times* deals with the subject at great length, defending the course taken by himself and his colleague, contending that to adopt the opposite course would lead to the conclusion that no practicing lawyer should be eligible for a seat in the House of Commons. Such a case as that under consideration has never before occurred in British history, and may never occur again. Should, however, it be clearly understood that men eminent at the Bar, and eminent also as the leaders of political parties in the House of Commons, are compelled by the rules of their profession to undertake duties in the courts which might prevent them from doing their duty as members of Parliament, Mr. Smith may find the tables turned upon him, and constituencies preferring as representatives men upon whose undivided attention to their political duties they could rely.

These men owed a duty to their constituents as representing them in the High Court of Parliament. Was not this their first and highest duty? Should they not have refused these briefs on the ground of the probability that their accepting them would prevent them from fulfilling their duty under their retainer from their constituents? Whether or not these two eminent counsel were trapped by their political opponents and cleverly "put out of business" as debaters by an appeal to their supposed paramount duty as counsel is not material to the discussion.

TRADITIONS OF PARLIAMENT.

Limitations imposed on Ministers of the Crown.

Turning now from the agents to the principals in this Marconi transaction, and dropping the question as to the manner in which the investigation was conducted, we find food for serious reflection. So far as proceedings in Parliament are concerned the matter is closed. The ministers accused have been exonerated from anything worse than "indiscretion." Their confessions have been made and accepted, and their friends have nothing but applause for their success in extricating themselves from a very dangerous position.

The official and professional view of the case is well presented in the following extract from the *Law Times* in which we fully concur so far as the charge of personal corruption is concerned:

"One good thing this Marconi affair has done is to dispose once and for all of the gross attacks that have been made against the personal honour of the Attorney-General. The charges of corruption and unfaithfulness to public duty have been shewn to be absolutely untrue, and the supposed evidence upon which the allegations were founded non-existent. Throughout the whole business Sir Rufus Isaacs has had the sympathy and confidence of the entire Profession, and his admirable speech on Wednesday last in the House of Commons, in which he admitted his mistake or error of judgment, was worthy of him as a man of honour and an ornament to the profession that he leads."

This is all very well as far as it goes. It would indeed have been a great misfortune if the personal honour, or professional reputation, of such responsible statesmen as the Attorney-General of England or the Chancellor of the British Exchequer could have been successfully impeached. But again the question arises as in the choice of counsel—why did these honourable gentlemen, both experienced men of the world, and both versed in business, choose to invest their hard earned savings in Marconi stock of all others? Other means of investment were open to them—why choose the stock of a company with

which the Government of which they were members was actually in negotiation or had been or might be? By doing so, they did something of the odium from which no special pleading will relieve them, and which no British Minister can do without forfeiting some portion at least of the respect to which his position entitles him will attach to them. The high tradition of the past should ever prevail not only in the British Isles but wherever British Constitutional rule is recognized and respected.

The Times thus sums up the situation in an article entitled "The charge and the apology":—

"The public will probably feel a certain sense of relief on reading the principal speeches of the Marconi debate in the House of Commons. We have no wish to treat an apology ungenerously, and we are very glad that it has been made; but we are bound to point out that neither Minister seems to understand how their conduct strikes the public. It may be put by way of a metaphor. A man is not blamed for being splashed with mud. He is commiserated. But if he has stepped into a puddle which he might easily have avoided we say that it is his own fault. If he protests that he did not know it was a puddle, we say that he ought to know better; but if he says that it was after all quite a clean puddle, then we judge him deficient in the sense of cleanliness. And the British people like their public men to have a very nice sense of cleanliness. In the speeches of both gentlemen on Wednesday, but especially in that of Mr. Lloyd George, there were too many and too vehement protestations of innocence. Neither the Attorney-General nor the Chancellor of the Exchequer is precisely fresh from the convent. Of course they had no corrupt intention. That is already admitted in the exoneration from the charge of corruption, to which, by the way, Mr. Lloyd George devoted a great deal more attention than was at all necessary, considering that he has been fully and by general consent exonerated. That charge no longer lies, and, though we deeply sympathize with him for having suffered under it, the point had no relevance to the motion or to the substance of Mr.

Cave's speech, which dealt with facts, not with motives. The public look at the facts, and what they feel is that men occupying those positions ought not to have made those mistakes and walked into those puddles. If they are so innocent and careless as not to know a puddle when they see one, then they ought not to occupy those extremely responsible positions. And similarly with regard to the line of action in the House of Commons last October. No man knows better than the Attorney-General what a suppressio veri is, and that it is extremely likely, if not certain, to mislead, however good the intention may be of the man who practises it. In our opinion a frank acknowledgment of the mistake, with the procedure known as throwing yourself on the mercy of the court, would have made a better impression on the public."

THE TRAINING OF JUDGES.

Fault has often been found, generally by those in opposition to the party in power, with the practice of placing on the Bench members of Parliament who for any reason wished to retire from political life, or whom it was expedient to make retire, and to whom the judicial office afforded a safe and honorable place of refuge. While the proffer of office of any kind as a reward for political service is not an act of corruption, it seems that something may be said for the choosing of judges from the ranks of those who have taken an active part in the work of the House of Commons and that there would be no fear of political animus being imported into questions of a judicial character even where political interests are at stake.

Speaking at a dinner given by the Lord Mayor of London to the judges, the Lord Chancellor said that "in other countries the judge belonged to a profession by itself. With us he was trained at the Bar, in the school of affairs, and often in that most remarkable of all colleges—in which he spent 25 years of his own life—the House of Commons. They might say what they liked about the House of Commons; but it remained the finest school

of affairs and the greatest representative institution in the world. (Cheers.) The greatest piece of good fortune that had come to him in his public life was that he had 25 years' training in that great school. The judges had a training and a tradition which he thought brought them in contact with the concrete realities of life in a way which was not easy where the training of the judges was different from what it is here. They learned by their very contact with public affairs to eliminate politics. He sat recently with three colleagues to hear a somewhat unusual and difficult case. It was a question of whether a member of Parliament had forfeited his seat or not. He had for his colleagues two very distinguished members of the opposite political party, and of his own party there was an ex-Chancellor and himself. He could only say that a more perfect tribunal he had never experienced, and he thought they all forgot that there was such a thing as politics in the world, or that there was anything but law to be considered. (Cheers.) These were the traditions of the Bench."

THE SOLICITOR-GENERAL OF CANADA.

The appointment of Mr. Arthur Meighen, M.P., to the vacant office of Solicitor-General of Canada will receive general commendation. Mr. Meighen is an Ontario man and a graduate of the University of Toronto and the Law School. In his own province he has already made an enviable legal reputation. Although in Parliament for a few sessions only, he has rapidly come to the front in debate; and, with good legal acumen and sound judgment, has been of valuable assistance to his party, notably during the past session on points of law and otherwise arising out of the Naval debate. His prominence among the younger legal members of the House has been for some time admitted, and, although the names of several clever members of the Bar occupying seats in the House were mentioned for the position, the action of the Government in promoting him to a

near-Cabinet rank will be no surprise to those who have followed events at Ottawa.

It has been an open secret for some time that the Government intended the next Solicitor-General to be more than a figurehead, as has usually been the case in the past. Anyone acquainted with the new Solicitor-General knows that he will not only undertake, but will seek for useful work which ought to be done by the incumbent of that position.

We have, before now, urged in these pages that the office of Solicitor-General should either be abolished or that the Solicitor-General should be given work which would make him a natural successor to the Minister of Justice, for which position the value of training and experience need not be emphasized. At the present time the Department of Justice is notoriously undermanned. The experience and ability of the present Deputy Minister (Mr. Newcombe) enables him to do more than should be expected of any one man, but it cannot be expected that he can give sufficient attention to all of the many matters coming before him. The Departmental work is heavy, and even with a numerically large staff the Deputy himself must have personal knowledge of it. In addition to Departmental work, Mr. Newcombe takes Government briefs in the Supreme and Exchequer Courts and before the Privy Council.

Without venturing to suggest what the duties of the Solicitor-General ought to be, we think we have sufficiently indicated that a good man can render most valuable assistance to the Minister of Justice and to his Department. Further, he should have such knowledge of the Department as would enable him to speak authoritatively and to answer questions in the House in the absence of the Minister of Justice, following the practice of Under Secretaries in the Parliament of Great Britain.

We congratulate both the Government and Mr. Meighen on the present appointment.

AN IMPERIAL LINK.

Of the many links which bind together the seat of empire with the overseas Dominions, none is more potent and of greater value than the right of every British subject to seek for justice at the foot of the Throne, as that right is embodied in the right of appeal to the highest tribunal to be found in the Empire. That right of appeal may have its inconveniences—It may sometimes even work injustice from want of proper information, but never do its judgments fail from want of intellectual acumen, or from the presence of any motive that could interfere with the giving of an honest and impartial decision. To avoid this only weak point—that of full knowledge of the matters in dispute, the presence of Dominion judges has been provided for and now it has been decided to raise the number of such judges from five to seven.

In moving the second reading of the Appellate Jurisdiction Bill, the Attorney-General explained that it had three main objects. It provides for the appointment of two additional Lords of Appeal in Ordinary, bringing the number up to six; it proposes to make the judicial life peers *ex officio* members of the Court of Appeal; and it raises the maximum number of Dominion Judges empowered to sit on the Judicial Committee of the Privy Council from five to seven. In making these proposals, Sir Rufus Isaacs explained, the Government was carrying out a pledge given at the Imperial Conference in 1911, when it was agreed that there ought to be six Lords of Appeal in Ordinary to take part in the proceedings of the Judicial Committee. The appellate jurisdiction of that tribunal he described picturesquely as a link of Empire. It was the most extensive legal jurisdiction known to civilization, and it was necessary that those who exercised it should be equipped with a knowledge of the laws and customs of all the nations in the various parts of the King's Dominions.

RULES OF PRACTICE—ONTARIO.

It was found desirable, in connection with the revision of the statutes of the Province of Ontario, to introduce some of the Rules of Practice into their appropriate places in the statutes affecting procedure in the Supreme Court and also to transfer some of the statutory provisions to the Rules. It was, therefore, necessary to have a careful revision of the existing Rules.

This task was very happily placed by the Attorney-General in the hands of Mr. Justice Middleton. No better selection could have been made, and the Bench, the Bar and litigants are to be congratulated that this matter was delivered to such a competent person. Mr. Justice Middleton undertook the task—a task involving much labour, and one which could only be accomplished satisfactorily by a person thoroughly familiar with the subject, and having an intelligent appreciation of what is needed to make the machinery of the Court run smoothly and with the least possible friction.

The learned Judge, having prepared a draft revision of the Rules and tariff of costs, has given to the Law Society and the profession of the Province of Ontario a most interesting summary of his views and the result of his labours in a letter, or paper, which will serve as an introduction to the revision. We have much pleasure in now giving this to our readers. They will note that any suggestions for changes will be considered; but after it has gone through the hands of one so pre-eminently fitted to deal with the matter, it is not likely that the work will need any change. The letter is as follows:—

"By the courtesy of the Attorney-General, I am permitted to submit my draft of these rules for criticism before reporting to him; and I am transmitting to you herewith the result of my labours for your perusal and consideration. If on perusal you find occasion, I shall be glad if you will, at your earliest convenience, communicate with me, so that any changes which may be deemed desirable may be made before I send my report to the Government.

"When the Judicature Act of 1881 was passed, a schedule of rules was also enacted, taken from the English Judicature Act of 1873. These rules did not purport to deal with the entire

practice of the Court, but provided that in matters not dealt with the practice of the courts consolidated, that was most convenient should be followed. This brought about much confusion, as standards of convenience differed; and in 1888 a revision of the rules took place, when an endeavour was made to formulate a complete code of practice. To the rules originally introduced from England were added others having an English origin, and many of our former Chancery orders and common law rules; but throughout this revision there were many provisions that the practice should be as in the 'Court of Chancery prior to the Judicature Act.'

"In 1897, the rules were again revised. Many of these allusions to former practice were eliminated, and much was done to remove difficulties that had developed in the working of the former rules; yet the composite origin of the system was plainly apparent, and there remained a lack of uniformity of expression arising from this. In many cases, also, there was an overlapping of provisions adopted from different sources, which occasioned obscurity and confusion.

"In the present revision my endeavour has been to complete the assimilation thus begun, and the elimination of references to former practice. Comparatively few of those now engaged in practice had any experience before the Judicature Act, and any allusions to the practice, either at law or in equity, prior to 1881, are to the majority meaningless, and the occasion of needless research.

"Many of the rules which contained no express reference to any prior practice were originally prepared for the purpose of modifying the practice then existing, and are only to be understood in the light of the situation at the time they were enacted. These provisions are frequently negative in form, and amount to no more than the repeal of former rules, or, more frequently, the annulling of a practice that had grown up apart from any express enactments.

"Many other rules had their origin in an attempt to meet some particular difficulty, and have now become unnecessary by reason of some more far-reaching change in the practice or in general law.

"Other provisions had their origin in a statute passed to remedy some particular matter; the main provision of the statute being accompanied by a number of ancillary provisions, in some cases differing in detail from somewhat similar general provisions of the rules, but now not necessary, by reason of wide general provisions. In this revision I have endeavoured to make the rules a consistent whole, capable of being understood without any reference to the origin of the particular rule or to any former practice.

"I have also endeavoured to reduce the practice to the greatest possible degree of simplicity, and so to classify the rules that what is required to be known may be readily found. To this end, general provisions have been made, applicable to all procedure, and in this way much repetition is made unnecessary, *e.g.*, in the former revisions almost every section conferring power upon the court directed it to be 'exercised upon such terms as to costs and otherwise as may be just;' and almost every time limit is accompanied by the expression 'or such further or other time as the court or judge may allow.' The disappearance of these familiar expressions does not mean change, but merely that general provisions apply and render repetition unnecessary.

"Another familiar expression eliminated is 'the court or a judge.' This expression had its origin in the theory that the expression 'the court' referred to the court sitting en banc during term; and, to enable a function to be exercised othewise than by the court so sitting, the words 'or a judge' were added. This theory and expression appear to be obsolete. In these rules I have conferred all power upon the court, and have by a general rule defined how the powers of the court are to be exercised, *i.e.*, by a single judge sitting in court, save in certain cases where that power may be exercised by a judge in Chambers, local judge, or the Master in Chambers.

"The former rules contained many detailed provisions concerning the officers of the court and the discharge of their duty. These seem unnecessary; and it was thought better to leave these details to be worked out by Orders in Council dealing with the appointment of officers and their duties, and by directions from

the judges and the Clerk of the Crown and Pleas to the Inspector of Legal Offices.

"In addition to many minor changes embodied in the revision, in the interest of simplicity and uniformity some changes of importance are suggested; and to these attention is respectfully drawn.

"One of the greatest problems in the framing of rules of practice is to devise a system which will at the same time afford a simple and speedy mode of enforcing admitted or undisputed rights, and yet be sufficiently elaborate and elastic to be adequate to the working out of important disputes and the adjustment of intricate and complicated matters. To this end it is essential that there should be at the threshold some means of separating cases in which there is a real dispute from cases in which there is no real dispute, but an attempt to abuse the practice by the setting up of some pretended defence. At one time our courts were congested with actions upon notes, bills of exchange, and mercantile accounts, where there was no real question as to the liability of the defendants, but which were defended, and had to be taken to trial before judgment could be obtained. At that time, with a population of less than one-tenth of that at the present day, the Assize lists were longer than now.

Examinations under the Common Law Procedure Act, which enable a defence admittedly untrue to be struck out, afforded a partial remedy. Since the Judicature Act a motion for judgment after appearance, which calls upon the defendant to disclose his defence upon oath, has proved yet more efficacious; but even in this there is much waste and delay. The decisions have established the plainly just principle that summary judgment can only be granted where there is no issue to try; hence, judgment cannot be granted where there is a conflict of evidence, and the result of the motion depends solely upon the defendant's affidavit. Where the defendant makes an affidavit disclosing any defence there is no doubt as to the result of the motion, and it becomes a purely formal matter.

"These rules provide for the elimination of the plaintiff's affidavit and of the formal notice of motion to be served after

appearance, and substitute a special form of writ, calling upon the defendant, where the writ is especially endorsed to at once file an affidavit shewing the nature of his defence. The plaintiff is then given the option of treating the affidavit so filed as constituting the statement of defence to his claim endorsed upon the writ and of entering the action for trial without formal pleadings. Three weeks' notice of trial is required in this case, so as to afford opportunity for discovery and preparation for trial. The plaintiff may, at his election, cross-examine the defendant upon the affidavit, and if the plaintiff think fit he may move for judgment upon such cross-examination. He thus makes his motion for judgment after he has an opportunity of considering whether it is likely to succeed.

"Wherever a writ is specially endorsed, the special endorsement will stand as the statement of claim, and the defendant must file his defence in the usual time after appearance.

"While these provisions, it is hoped, will be found sufficient to prevent vexatious defences, it has been difficult to devise any entirely satisfactory remedy for vexatious actions. The temptation to bring an action without sufficient cause is not so great as the temptation to defend without reason. Under certain statutory provisions, security for costs may be ordered in classes of actions in which unfounded suits are more prevalent, *e.g.*, libel actions, and actions against public officers.

"The classes of cases in which security can be ordered has been somewhat enlarged. Where, on the plaintiff's examination, his case appears to be frivolous, power is given to order security; and a similar provision has been made where a worthless plaintiff has been chosen to prosecute a class action really in the interest of others. He is not a nominal plaintiff under the present decisions, as he is asserting his own right as a member of the class. Farther than as suggested in the rules relating to security it is not safe to go.

"Another change is the abolition of the order to produce. An affidavit on production is directed to be filed ten days after the time for defence. For many years an order to examine was

considered necessary. Its abolition has produced no inconvenience while reducing expense. This change is upon the same line.

"Petitions are abolished. All actions are to be instituted by writ; all other proceedings by originating notice; all interlocutory proceedings by a notice of motion.

"The scope of originating notice has been much enlarged. Under the present rules this procedure is confined to questions arising in the administration of an estate. In the new rules it is made to apply to the determination of any question upon the construction of a will or document, and is also made to afford means for determining in a summary way any question arising between parties when there is no question of fact in issue.

"Provision is made for determining any question under the Vendors and Purchasers Act upon originating notice, and for giving notice to any person having a claim or suggested claim giving rise to the difficulty, so that the decision may be binding upon him as well as upon the vendor and purchaser.

"Provision is also made that any question which would arise upon a quieting titles application may be determined in a summary way. Frequently titles have to be quieted where there is only one matter which really requires determination.

"A provision has been adopted from the English Partnership Act relating to realization upon the share of a partner against whom a judgment has been recovered.

"Some of the provisions found in the former rules have been omitted because they are now to be found in particular statutes, *e.g.*, rules relating to bailable proceedings and absconding debtors, rules relating to solicitor and client taxation, and to quo warranto.

"The result of all this has been to reduce the total number of rules to little more than half the number of existing rules.

"The summons for directions which has been adopted in the English practice has not commended itself to me. In practice in England it appears not to have accomplished that which was hoped from it. No doubt if counsel of ability, familiar with the details of the particular case, appear before an experienced judge and discuss the procedure in the particular case, the re-

sult ought to be satisfactory; but the actual result is far otherwise when the factors are different; and in practice it has been found that in most instances a stereotyped form of order is used, which follows the general provisions found in the rules.

"In a contributed article in the *Law Times* (133 L.T. 565), it is said: 'The compulsory summons for directions, from which certain judges hoped for so much, has proved very ineffective, and is deemed by all barristers in large practice with whom I have discussed it to perform the same functions as the fifth wheel of a coach. One has only to read the orders made on these summonses to see that they are all of a stereotyped character, and in the majority of cases wholly unnecessary." The editorial comment on this is: 'It is difficult to see what useful purpose the summons for directions has served, and in the vast majority of cases it is wholly unnecessary.'

"In these rules provision is made for the directing of a speedy trial upon an injunction motion, and to permit a motion for judgment in mercantile cases immediately upon the issue of the writ. Attention is also drawn to Rules 142, 145, and 156, relating to pleading.

"The tariff of costs has been the occasion of much thought. I have been assisted in framing a new tariff by committees of the Ontario Bar Association and the County of York Law Association. As the new tariff of solicitor's fees departs widely from the tariff now in use, it may be well to give at length the reasons for recommending it.

"Two leading ideas must be kept in mind. As has often been said, natural justice demands that in ordinary cases the losing party should pay the costs; not upon the principle that 'to the victor belongs the spoils'—for costs are not to be regarded as spoils, but as an indemnity to the successful party who has been compelled to resort to the courts to obtain his rights.

"The second is that in cases in which costs are awarded, the amount actually given should be as nearly as practicable an indemnity for the costs necessarily incurred. If costs taxed do not amount to the sum which the successful party must pay his solicitor, to that extent the purpose fails for which the costs are

given: 'that he may be indemnified for the costs occasioned by his unjust vexation.'

"At the same time, such safeguards must surround the taxation of costs as to avoid costs being made an instrument of oppression. The temptation is ever present, not only to the solicitor, but to the client, to incur costs in the hope that the opponent will in the end have to pay. This sometimes is from malice or greed; more often with the idea that the client's interest will be served by making it plain that litigation can be made so burdensome that an opponent had better accept any compromise offered.

"The proposition has been repeatedly made that in the interest of the public and the solicitor the costs of litigation should be definitely fixed and ascertained, so that the parties might know in advance exactly how much is risked in litigation. The experiment has been tried by limiting the amount to be awarded as party and party costs, and has been found to be a failure. The solicitor for the successful party must be paid for the services actually rendered; and his opponent, knowing this and knowing that he incurs no additional risk, deliberately sets himself to increase the burden of the excess of solicitor and client costs over and above the party and party costs than can be awarded. Similarly, when the costs of an appeal have been fixed at a sum not adequate to indemnify, some litigants appeal every case, so as to discourage litigation with them; the verdict being sadly cut into by the excess costs. It must not be forgotten that litigation is war, that large corporations have much litigation, and that some frame their policy in dealing with litigants in such a way as to make litigation so full of terror, by reason of expense and delay, as to bring about the settlement of the majority of claims at much smaller sums than the claimants are really entitled to receive.

"When any so-called 'block tariff' is devised, if it is not to be in itself burdensome it must be based upon the actual costs of litigation conducted on economical lines. Then it becomes an easy matter, when the extra expense has to be borne by the opponent, to make the actual cost exceed the amount fixed. In some jurisdictions where the experiment has been tried, this defect

became very plain, and a remedy was sought in a provision giving the judge power to award a lump sum in addition to the fixed fee. This was a complete abandonment of the principle of certainty upon which the block tariff was based, besides introducing in its worst forms the evils of the personal equation. When the amount allowed for costs is discretionary, there are as many different standards as there are judges, and chaos reigns. It was found that Mr. Justice A. said: 'You are lucky to have a verdict, and should not ask for extra costs from the unfortunate defendant;' whilst Mr. Justice B. would have said in the same case, 'It is a close case, won by the skill of your advocate, and I shall give you a handsome increased fee.'

"Another objection to a block tariff is that the same allowance must be made for a case that is very simple, and for a case that is of necessity long and complicated. The doctrine of averages might be applied if all litigation were between the same litigants instead of between different parties; but there is no justice in making A. pay, in his litigation with B., part of the costs in a suit between X. and Y.

"In the tariff here proposed, a modified form of block tariff has been adopted, giving a lump sum from stage to stage of the action; some of the allowances being made subject to increase in the discretion of the taxing officer or judge. Regarded as a grouping of items now charged separately, this seems to be defensible; and an endeavour has been made to secure uniformity in the exercise of the discretion given, by providing, as now, that most of the increased fees are to be in the discretion of the taxing officers at Toronto. Where discretion has been given to local officers it was found that individual discretion varied to an extraordinary degree. Only by reference to some central authority can any uniformity be secured.

"The adoption of this system will do away with the present itemized bill, and it is believed will meet with acceptance, as there is no encouragement given for unnecessary and useless proceedings.

"W. E. MIDDLETON."

ARSON v. *INSURANCE.*

Statistics recently published shewing the loss of property by fire in the United States generally, and especially in the City and State of New York, disclose a state of things which seems hardly credible as existing in a highly civilized and professedly law abiding community. The system of insurance against fire intended for the protection of the honest trader, or *bonâ fide* owner of property, against the unavoidable losses caused by the accident of fire has been converted into a gigantic system of fraud, carried on at the expense of the shareholders of the insurance companies for the benefit of dishonest policy holders. This description of fraud is, we regret to say, not unknown in this country, and is coeval with the system of insurance itself. It is not confined to losses by fire, but has been practised on sea as well as on land, with the added criminality of risk of life as well as loss of property. But if we may believe the statement put before us, never has such a systematized method of robbery been attempted as that to which we refer. Simply to burn a house or shop for the sake of the difference between the insurance money and the actual loss is a game any one can play at who is willing to take the risk of prosecution for arson, but to increase the profit and lessen the risk, other means must be resorted to.

How great has been the success of such means, and on what a scale they have been put in practice we may learn from the statements gathered from figures given by such an authority as Mr. Arthur McFarlane and published in *Collier's Weekly*. The following paragraph is quoted from a paper by Sidney Brooks in the *Daily Mail*, London.

"About £50,000,000 of property is annually burnt up in the United States. That is anywhere from 8 to 13 times the per capita loss sustained through fire by any of the peoples of Western Europe; and the statistics shew that while the population of America has increased by only 21 per cent. in the past decade, her fire loss has increased by 84 per cent., exactly four times as fast.

"And this in spite of the fact that America boasts the most efficient and daring fire departments to be found anywhere, and that in the central and most crowded areas of several of the largest cities the law compels the erection of 'fireproof' buildings of steel, concrete, and hollow tile. Yet New York alone has more fires every year than all the capitals of Europe put together. One American in every 250 has a fire each year, and the actual value of the property destroyed represents probably less than half the amount extracted from the people to pay for additional safeguards and the increased cost of insurance. Not less than £100,000,000 is the full tribute thus annually paid by Americans, directly and indirectly, to the fire fiend."

This wholesale destruction of property is not the work of isolated and independent incendiaries, still less the result of losses by fire which no precaution seems able entirely to prevent. Mr. McFarlane's conclusion is that from one-half to two-thirds of the fires in the United States are due to incendiarism. This means a destruction of property in the United States yearly of the value of $1,125,000 besides an equal or somewhat larger sum as an insurance tax.

The writer from whom we quote goes on to say:—

"Matters, indeed, have come to such a pass that the fire statistics are a closer index to the prosperity of the country and to the condition of particular industries than either Wall street or the bankruptcy returns or the official trade figures. Every period of financial and commercial depression is not only accompanied but heralded by a sudden increase of fires. The panic of 1907 took Wall street by surprise. But the fire insurance companies knew what was coming months before, and many of them prepared for it by cancelling half their risks."

Strange to say that while the losses by fire of property insured falls ultimately upon the shareholders, the companies, or rather their managers and agents are, to some extent, responsible for this state of affairs, especially the larger companies. Were there no fires there would be no insurance. A good fire and a prompt settlement are often the best of advertisements.

The more fires there are the easier it is to crush out the competition of smaller rivals. Finally, a big conflagration is an excuse for putting up the rates all over the country.

Again our writer goes to to make a charge against not only the law relating to arson as its exists in the United States, but also against the way in which it is administered. He goes on to say: "Effective investigation of the causes of fires by public officials hardly exists in any State in the American Union, and arson in consequence is one of the safest of crimes. And finally, even when the criminal is caught it is all but impossible to convict him. In some States, indeed, it appears to be an open question whether a man has not a legal right to burn his own property if he chooses; and, in all States the rules of evidence are such that unless the incendiary has actually been seen to light the fire and unless the match with which he did it can be produced in court, there is next to no chance of bringing him to justice.

"It is just a sample of what obtains all over the United States that, while in New York, by the testimony of its own Fire Commissioner, there are at least 4,000 cases of arson a year, there have been fewer than twenty convictions in the past decade."

As we have remarked above it was not by ordinary means that a state of things above described has been brought about. The records of the police courts prove that there are organized gangs of fire-raisers who are regularly employed by those interested to set fire to buildings as they may be directed, and who by means of their organization do so with comparative impunity.

We have not dealt with this subject in any spirit of invidious comparison, but because moral disease, like physical, is catching. There is so much in our conditions of life similar to those which prevail over the border that into whatever dangerous habits our neighbours fall, we are liable to follow their example. We have no figures at hand to shew whether or not we may have already done so, but it can do no harm by way of warning to point out to what dangerous lengths what may seem to be a small evil at first may grow, when circumstances are favourable for its development.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—LEGAL DEVISE—CONSTRUCTION — TECHNICAL WORDS—ESTATE IN TAIL MALE.

In re Simcoe, Vowler-Simcoe v. *Vowler* (1913), 1 Ch. 552. This was an application for the construction of a will whereby the testator devised his real estate to the plaintiff, one of his nephews, a bachelor, "and his issue male in succession, so that the elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue" over to another nephew. Eady, J., held that the devisee took an estate in tail male in possession, and he rejected the contention that the devise should be read as a devise to the plaintiff for life with *cyprès* remainders to his unborn sons successively in tail with *cyprès* remainders over, on failure of those entails.

PRINCIPAL AND AGENT—STOCKBROKER — SPECULATIVE TRANSACTION—DEATH OF PRINCIPAL—CLOSING ACCOUNT — DUTY OF STOCKBROKER — TAKING OVER STOCKS BY STOCKBROKER.

In re Finlay, Wilson v. *Finlay* (1913), 1 Ch. 565. The Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.), have affirmed the decision of Warrington, J. (1913), 1 Ch. 247 (noted ante, p. 223). It may be remembered that the plaintiffs, as brokers, in order to minimise the loss of their client on certain stock transactions on his default had taken over the shares at the current market price, instead of attempting to sell them in the market, which would probably have occasioned a greater loss. This, the Court of Appeal holds, in the circumstances, was a legitimate way of closing the account.

WILL—POWER OF APPOINTMENT—SPECIAL AND GENERAL POWER OVER SAME PROPERTY—EXERCISE OF POWER.

In re Ackerley, Chapman v. *Andrew* (1913), 1 Ch. 510. In this case the point up for decision was whether a testatrix had executed a special power by her will. Under a will the testatrix had a general power to appoint the trust estate in default of

any child attaining a vested interest and she had also a special power to appoint in favour of any husband who should survive her during his life or any less period. By her will, without specially referring to either power, she did "give devise appoint and bequeath all my estate and property and effects whatsoever, and wheresoever, both real and personal, which I have power to dispose of by my will, to my husband, Alexander Chapman absolutely, and I appoint him sole executor of this my will." It was claimed on behalf of the surviving husband that this was not only a good exercise of the general power, but also of the special power which the testatrix had to appoint a life estate to her surviving husband. On behalf of an infant daughter it was contended that the will shewed no intention of exercising the special power, and that the words "my" and "absolutely" indicated an intention merely to exercise the general power. Sargant, J., however, was of the opinion that there was a clear intention on the part of the testatrix to bestow on her husband all the benefit she could, and that in the circumstances, both powers were well executed.

SETTLEMENT—POWER OF APPOINTMENT — TITLE—SALE — COMPOUND SETTLEMENT—TRUSTEES — SETTLED LAND ACT, 1882.

In re Gordon and Adams (1913), 1 Ch. 561. This case decides a neat little question of conveyancing. By a will a testator appointed trustees, and he empowered his wife by deed or will to appoint and dispose of all or any of his property as she should think fit, and in default, or until such disposition, and so far as it should not extend, the testator gave the lands in question to the use of his wife and her assigns for life with remainder to the use of one Gordon and his assigns for life, with divers remainders over. And the testator empowered his trustees to sell any part of his freehold estates thereinbefore given. The testator died in 1891, and his widow appointed Gordon her sole executor, and in exercise of the power of appointment appointed the land in question to Gordon for life with remainders over. She died in 1892, and Gordon having contracted to sell the land under the Settled Land Act, 1882, the purchaser objected that a good title could not be made until trustees were appointed for the compound settlement created by the two wills. But Eve, J., held that such appointment was unnecessary, because the appointment made by the widow's

will must be read into the will of her husband, and as the trustees of his will were still *in esse*, any further appointment of trustees was not necessary for the purpose of making title. The purchaser's objection was therefore overruled with costs.

PRACTICE—ORDER OF COURT OF APPEAL DECLARING PRIORITIES AND FOR SALE—APPEAL TO HOUSE OF LORDS—ENLARGING TIME FOR REDEMPTION PENDING APPEAL.

Munks v. *Whiteley* (1913), 1 Ch. 581. An order of the Court of Appeal was made in this case settling priorities, appointing a day for redemption and in default directing a sale. The defendants were desirous of appealing from the judgment of the Court of Appeal to the House of Lords, and applied to the Court of first instance to enlarge the time for redemption pending the appeal. A question was raised whether the application ought not to have been made to the Court of Appeal, but Parker, J., held that the application was properly made in the Court of first instance and granted the enlargement on terms.

COMPANY—WINDING UP—FLOATING CHARGE — DEBENTURES — PARI PASSU CLAUSE—INTEREST PAID TO SOME DEBENTURE HOLDERS TO A LATER DATE THAN OTHERS—DISTRIBUTION OF ASSETS—EQUALIZATION OF PAYMENTS.

In re Midland Express, Ltd., Pearson v. *The Company* (1913) 1 Ch. 499. This was a winding-up proceeding, and a question arose on the distribution of the assets as to the rights of certain debenture holders. The debentures were a floating charge on the assets of the company and were payable *pari passu*. It appeared, however, that some of the debenture holders had been paid interest on their debentures down to a later date than others, and as the assets were insufficient to pay the debentures in full the latter claimed that they were entitled to be paid in the first place, interest on their debentures down to the time that interest had been paid on the others, but Sargant, J., held that the amounts due to each debenture holder must be ascertained with interest down to the date of the Master's certificate, and that the assets ought to be distributed rateably according to the amounts so found due, as in the absence of any express provision to that effect, the debenture holders were not entitled to have the assets applied in equalizing the payments of the debentures.

EVIDENCE—ADMISSIBILITY—DECLARATION BY DECEASED PERSON—PATERNITY OF ILLEGITIMATE CHILD.

Ward v. *Pitt* (1913), 2 K.B. 130. The English Workmen's Compensation Act, it may be remembered, provides that the illegitimate offspring of a deceased workman is entitled to compensation. In the present case an attempt was made to prove that a posthumous illegitimate child was the child of the deceased by a statement of the deceased to the effect that he promised to marry the mother, that he intended to marry and make a home for her, that he admitted the paternity of, and intended to maintain, the child; but the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Hamilton, L.JJ.) held that such statements are not declarations by a deceased person against his pecuniary interest and are not admissible.

PRACTICE — DISCOVERY — DEFAMATION — PUBLICATION TO UNKNOWN PERSONS—FISHING INTERROGATORY.

Barham v. *Huntingfield* (1913), 2 K.B. 193. This was an action for defamation imputing immoral conduct to the plaintiff, a married woman. The statement of claim alleged publication to one named person, and also during three specified years to various other persons unnamed. The plaintiff sought to ask the defendant whether he had in any of the three years uttered the words complained of, or words to the same effect, to any persons other than the person named, and the names of the other persons, if any. On behalf of the plaintiff, *Russell* v. *Stubbs*, 52 whether, in the circumstances, the action was premature; and second, whether the plaintiffs were bound by the certificate when issued, and the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Alverstone, Atkinson and Shaw) answered both questions in the negative. The architect in their Lordships' judgment had disqualified himself as arbitrator by his conduct and therefore the plaintiffs were not obliged to postpone bringing their action until after the giving of his certificate, neither were they bound by his certificate when it was given.

PRACTICE—ASSESSMENT OF DAMAGES BY MASTER—APPEAL FROM ASSESSMENT—FORM TO WHICH APPEAL LIES—RULE 481—(ONT. RULE 579.)

Dunlop Pneumatic Tyre Co. v. *New Garage & Motor Co.* (1913), 2 K.B. 207. In this case judgment had been given by Phillimore, J., at the trial for damages to be assessed by a Mas-

ter. The damages were accordingly assessed by the Master. The defendant desired to appeal from the assessment, and the question was whether he should appeal to a Divisional Court or to the Court of Appeal. The Court of Appeal (Williams, Farwell and Kennedy, L.JJ.) held that the appeal lay to the Court of Appeal, presumably on the ground that it was, in effect, an appeal, not from the Master, but from Phillimore, J.

BUILDING CONTRACT—ARBITRATION CLAUSE—REFERENCE TO ENGINEER—DISQUALIFICATION—DISPUTE INVOLVING EXAMINATION OF ENGINEER—STAYING PROCEEDINGS—ARBITRATION ACT, 1889 (52-53 VICT. C. 49), S. 4—(9 EDW. VII. C. 35, S. 8, ONT.)

Bristol Corporation v. *Aird* (1913) A.C. 241. This was also an action to recover a balance due on a building contract which provided for a reference of disputes to the engineer employed by the owner. Upon the settlement of the final account a dispute arose of a substantial character between the contractor and the engineer, involving a probable conflict of evidence between them. The defendants applied under the Arbitration Act, s. 4 (see 9 Edw. VII. c. 35, s. 8, Ont.) to stay the action, but the Court of Appeal affirming, Scrutton, J., held that in the circumstances the action should not be stayed, and the House of Lords (Lords Atkinson, Shaw, Moulton, and Parker) affirmed the decision, their Lordships being of the opinion that the engineer had become a necessary witness, and therefore ought not also to be a judge of the matter in dispute; but their Lordships held that such a dispute as to one matter would not necessarily disqualify the arbitrator as to all other matters, and Lord Parker states that according to the practice of the Chancery Division an action may be stayed as to some matters in dispute and allowed to proceed as to others, though all the matters are subject to an agreement for reference.

POWERS OF PROVINCIAL LEGISLATURE—ALBERTA ACT, 1 GEO. V. C. 9, HELD TO BE ULTRA VIRES—CIVIL RIGHTS EXISTING AND ENFORCEABLE OUTSIDE PROVINCE.

Royal Bank of Canada v. *The King* (1913) A.C. 283. This is an important decision on the question of the jurisdiction of Provincial Legislatures. The appellant bank received on deposit from England at its branch in New York the proceeds of a mort-

gage bond issue of the Alberta Railway Company, guaranteed by the Province of Alberta. Under instructions from its head office in Montreal, a special railway account in respect of the above mentioned deposit was opened at its Alberta branch in the name of the Treasurer of the Province (no money being sent there in specie and the account remaining under the control of the head office), but the amount of the deposit was credited to the account in Alberta for purposes in connection with the construction of a contemplated railway wholly within the province as provided by statutes of Alberta and orders in Council of that province. By the Alberta Act, 1 Geo. V. c. 9 (which recited that the railway company had defaulted in payment of the interest on the bonds and in construction of the railway, and ratified the guarantee of the bonds), it was enacted that the whole proceeds of the bonds, including the amount deposited with the appellant bank, should form part of the general revenue of the province, free from all claim of the railway company or their assigns, and should be paid over to the treasurer of the province. The present action was accordingly brought by the Crown and Provincial Treasurer to recover the amount of the deposit held by the appellant bank. Stuart, J., who tried the action, gave judgment for the plaintiffs, which was affirmed by the Provincial Supreme Court. It may be remarked that the railway and construction companies were made parties defendants on their own application for the purpose of enabling them to resist payment, which, by the way, is a somewhat unusual proceeding; but it does not appear that any of the bond holders were made parties. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Atkinson, and Moulton) have overruled the judgment of the Alberta Court and find that the Act in question is ultra vires of the Provincial Legislature, because the bond holders, having subscribed their money for a purpose which had failed, were entitled to recover the money from the bank at its head office in Montreal; that this was a civil right existing and enforceable outside the Province, and the Province could not validly legislate in derogation of that right.

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

KENNEDY *v.* KENNEDY.

(11 D.L.R. 328.)

Garrow, Maclaren, R. M. Meredith, and Magee, JJ.] [Jan. 15.

Judgment—Effect and conclusiveness—What matters concluded.

The plaintiff is not estopped by judgments in former actions, where the same subject has not been adjudicated, although such former actions may have been between the same parties and concerning the same estate.

Kennedy v. *Kennedy* (1911), 24 O.L.R. 183; *Foxwell* v. *Kennedy* (1911), 24 O.L.R. 189, referred to. See also *Kennedy* v. *Kennedy*, 3 D.L.R. 536.

Perpetuities—In general.

Any gift not of a charitable nature, the purpose of which is to tie up property for an indefinite term, is void as creating a perpetuity.

Kennedy v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.

Wills—Restraints upon alienation—Perpetuities.

A bequest is void, as tending to create a perpetuity, by which the residue of an estate was given to executors or trustees to be used and employed by them in their discretion in maintaining and keeping up, until sold and disposed of, the testator's residence, as a home for his son, his son's family and descendants, or for whomsoever it should by the son be given by will or otherwise.

Kennedy v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.

Perpetuities—In general—Determining point of time in a will.

In considering a case in which the rule that a gift which creates or tends to create a perpetuity is void is invoked, it is not after-events that should be looked at, but the situation at the death of the testator; it must then be seen that the event which is to bring about a final distribution is certain to fall within the period prescribed; if it is not, the gift is void; and the fact that subsequently the event did actually happen within the time, is of no consequence.

Kennedy v. *Kennedy*, 3 D.L.R. 536, affirmed in this respect.

Wills—Devise and legacy—Description of beneficiaries—When annuitant is a "pecuniary legatee."

A mere annuitant under a will may be a "pecuniary legatee," within the meaning of that term in the residuary clause, where no contrary intention appears in the will, and where in aid of such construction it appears that the will contains other bequests to which the term "pecuniary" could not apply.

Wills—Devise and legacy—What property passes—"To maintain and keep up" a family residence, effect.

The discretion in a will "to maintain and keep up" a family residence will not ordinarily be construed to cover the support of any of the inmates of the residence.

Wills—Devise and legacy—"Discretion" of named trustee—Exercise by others.

While a testator may so express a "discretion" with respect to trust property as to make it exercisable by the named trustee only, yet where the exercise of the discretion has not been clearly limited by the terms of the will, the broader construction may be given.

Re Smith, Eastick v. *Smith,* [1904] 1 Ch. 139; *Crawford* v. *Fenshaw,* [1891] 2 Ch. 261; Trustee Act, 1 Geo. V. (Ont.), ch. 26, sec. 4, sub-sec. 6, referred to.

E. D. Armour, K.C., for the appellant. *Bicknell,* K.C., *Russell Snow,* K.C., *F. P. Galt,* K.C., and *W. A. Proudfoot,* for respondents.

Middleton, J.] SIMMERSON *v.* GRAND TRUNK R. Co. [April 9.

(11 D.L.R. 104.)

Master and servant—Liability—Person in charge—Brakeman giving signals.

A brakeman standing on the ground and giving signals to the engineer of a locomotive engaged in transferring cars from one track to another, is a person in charge or control of the engine, within the meaning of s. 3, s.-s. 5, of the Workman's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

Allan v. *Grand Trunk R. Co.,* 8 D.L.R. 697; *Martin* v. *Grand Trunk R. Co.,* 8 D.L.R. 590, applied; and see Annotation to this case.

W. S. McBrayne, for plaintiff. *D. L. McCarthy,* K.C., for defendants.

ANNOTATION ON THE ABOVE DECISION.

Sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, should receive a liberal construction in the interests of the workman. An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other. In an Ontario case the plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders M. gave a wrong direction to the driver of the yard engine, by reason of which the plaintiff was struck by the engine and injured. The engine driver testified that he took his instructions from M.:—*Held* (Lennox, J., dissenting), that there was reasonable evidence that M. was, on the occasion in question a person in charge or control of the engine, within the meaning of sub-sec. 5; and, upon the findings of the jury in an action to recover damages for the plaintiff's injury, the defendants were responsible for the negligence of M.: *Martin* v. *Grand Trunk R. Co.*, 8 D.L.R. 590, 27 O.L.R. 165.

Where a brakeman engaged in coupling cars at night is injured by reason of the negligence of the engineer in charge of the locomotive in failing to wait for a new signal to start, it having been prearranged between the two that the brakeman was to give such signal by lantern, the master is liable under sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act, making an employer responsible "by reason of negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon a railway, tramway or street railway": *Allan* v. *Grand Trunk R. Co.*, 8 D.L.R. 697, 4 O.W.N. 325.

In the case of *McLaughlin* v. *Ontario Iron and Steel Co.*, 20 O.L.R. 335, an overhead crane in the defendants' factory, operated by electric power, was used to raise and move heavy castings from place to place. M., the man who operated the crane, sat in a cage which ran upon rails, and from it he regulated the movement of the crane; when the crane was brought to the place where it was to be used, it was lowered and raised according to the direction of the foreman, who stood on the ground below, near the casting which was to be moved. The crane had been in use where the plaintiff, a foreman moulder, was working, and he had told M. that he did not require it any more, and, while M. was moving it away, it was raised above the plaintiff's head, the cable parted, and a heavy hook attached to the cable fell and injured the plaintiff. In an action to recover damages for the injuries sustained, the jury found that the injuries were caused by the negligence of M. in hoisting the hook and the sheaf of the crane over the plaintiff's head and letting it come in contact with the drum or something unknown, thereby breaking the cable:—*Held*, that M. was a person having the charge or control of an engine or machine upon a railway or tramway within the meaning of clause 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160; and

the defendants were answerable for his negligence. Clause 5 was held to be much wider in its scope than as it stood in the first Ontario Act, 49 Vict. ch. 28, which dealt with this subject.

For a general discussion of the law relating to negligence of a fellow servant, where an action is brought to recover under this section of the Workmen's Compensation for Injuries Act, where there is a person in a position of superintendence whose orders resulted in injury to the plaintiff, see *Brulott* v. *Grand Trunk Pacific R. Co.*, 24 O.L.R. 154.

SUPREME COURT.

PEPPERAS *v.* LEDUC.

(11 D.L.R. 193.)

Britton, J.] [May 2.

Contracts—Illegality of—Public policy — Immoral motives — Want of consideration—Promise ex turpi causa—Breach of promise—Plaintiff's marriage to another.

Held, 1. A promise made in consideration of the cessation of illicit cohabitation is void simply for want of any consideration, so that if made in the form of an instrument under seal there may be *primâ facie* a valid contract; yet if the transaction is of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connection, the instrument would be void *ex turpi causa* and no claim or defence can be maintained which requires to be supported by allegation or proof of such an agreement; hence each of the parties thereto is powerless to enforce or to set aside an agreement of this character by judicial process.

2. Damages for a breach of promise of marriage cannot be recovered when the plaintiff has subsequently married a person other than the defendant.

J. H. McCurry, for plaintiff. *G. A. McGaughey*, for defendant.

ANNOTATION ON ABOVE CASE.

The ground on which the Court refuses to enforce immoral contracts is that they are against public policy as encouraging and aiding immorality. Where the plaintiff knew that the additions which he made to a house were for the purpose of increasing the defendant's immoral trade,

the Court refused to aid in enforcing a mechanics' lien for the work done: *Pearce* v. *Brooks*, L.R. 1 Ex. 213; *Clark* v. *Hagar*, 22 Can. S.C.R. 570; *Miller* v. *Moore*, 17 W.L.R. 548 (Alta.).

In *Perkins* v. *Jones*, 7 Terr. L.R. 103, the plaintiff said to the defendant, referring to a certain named lot: "If you can get me that lot I will build." Accordingly the defendant, a builder by trade, did purchase the lot for the purpose of building a house thereon for the plaintiff; and a few days later the plaintiff entered into a written agreement respecting such lot and house, with the defendant, and paid $500 cash down. The house was intended for purposes of prostitution, as the defendant knew, and before the defendant had done anything toward building other than "brushing" the lot, the plaintiff gave notice to the defendant that she had decided not to build and demanded an immediate return of the $500 paid by her: *Held*, *per curiam*, that there had been part performance of the contract and that subsequently the plaintiff could not recover the money paid by her thereunder. *Quære*, *per* Newlands and Harvey, JJ., whether money paid under an immoral contract can be recovered back under any circumstances: *Perkins* v. *Jones* (1905), 7 Terr. L.R. 103.

The effect of illegality in the matter or purpose of an agreement is to render it wholly void of legal effect; no claim or defence can be maintained, which requires to be supported by allegation or proof of an illegal agreement: *Taylor* v. *Chester* (1869), 38 L.J.Q.B. 227, L.R. 4 Q.B. 314; *Odessa Tramways Co.* v. *Mendel* (1878), 47 L.J.C. 505, 8 Ch.D. 235. See *Hyams* v. *King* (1908), 77 L.J.K.B. 796, [1908] 2 K.B. 696; Leake on Contracts, 6th ed., 564. Either party may repudiate the agreement, with or without alleging a reason, and may afterwards justify on the ground of the illegality: *Cowan* v. *Milbourn* (1867), 36 L.J. Ex. 124, L.R. 2 Ex. 230.

The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of contrary to the real justice as between him and the plaintiff. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law, there the Court says he has no right to be assisted: Mansfield, C.J., *Holman* v. *Johnson*, 1 Cowp. 343.

Illegality which will avoid a contract as against a party will avoid it also as against his representative: *Phillpotts* v. *Phillpotts* (1850), 20 L.J. C.P. 11, 10 C.B. 85. And the effect of illegality is the same in equity as at law. A contract or instrument which fails in a court of law by reason of its illegality cannot be enforced in equity; although money has been paid and received in respect of that contract. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claims sought to be actively enforced on the footing of an illegal contract, the defence of illegality is as available in a Court of equity as it is in a Court of law: *Thomson* v. *Thomson* (1802), 7 Ves. 470; *Re Cork and Youghal Railway* (1869), 39 L.J.C.

277, L.R. 4 Ch. 748. See *Chapman* v. *Michaelson* (1908), 78 L.J.C. 272, [1909] 1 Ch. 238. A bond or covenant or other security subsequently given for a debt originating in an illegal consideration or transaction, or for a prior security for such debt, is vitiated by the same illegality: *Fisher* v. *Bridges* (1854), 23 L.J.Q.B. 276, 3 E. & B. 642; as a bill given to a broker for his charges in effecting an illegal insurance: *Ex p. Mather* (1797), 3 Ves. 373; a bill in renewal of a bill given for a gaming debt: *Wynne* v. *Callander* (1826), 1 Russ. 293; a security given to a compounding creditor by way of illegal performance: *Geere* v. *Mare* (1863), 33 L.J. Ex. 50, 2 H. & C. 339; a bond given to the holder of a note which had been given for an illegal purpose and indorsed to the holder when overdue: *Amory* v. *Meryweather* (1824), 2 L.J.O.S.K.B. 111, 2 B. & C. 573.

A guarantee of an illegal debt is illegal and void; but a guarantee of a debt which is merely void and not illegal, as the loan of a company in excess of their borrowing powers, is valid: *Yorkshire Waggon Co.* v. *Maclure* (1881), 51 L.J.C. 253, 19 Ch.D. 478. See *Re Coltman* (1881), 51 L.J.C. 3, 19 Ch.D. 64.

The effect of illegality is the same, in whatever form the contract is framed, whether in the form of a simple contract or of a contract under seal, or of a bond with an illegal condition: Co. Lit. 206*b*; *Duvergier* v. *Fellows* (1828), 7 L.J.O.S. C.P. 15, 5 Bing. 248, (1830), 8 L.J.O.S. K.B. 270, 10 B. & C. 826, (1832), 1 Cl. & F. 45, and though the contract is apparently valid in form and matter, extrinsic evidence is always admissible in variance of or in addition to the contract in order to shew that the transaction is illegal and therefore void, even in the case of a covenant or contract under seal: *Collins* v. *Blantern* (1767), 2 Wils. 341, 1 Sm. L.C. 355. The facts shewing illegality, either by statute or common law, must be pleaded; they cannot be proved under a bare denial of the contract: Ord. XIX. rr. 15, 20. See *Willis* v. *Lovick* (1901), 70 L.J.K.B. 656, [1901] 2 K.B. 195; but where the illegality appears from the plaintiff's own evidence (as in the case of a criminal conspiracy to create a market by fictitious dealings in shares) it is the duty of the Court to take judicial notice of the fact, and to give judgment for the defendant, although the illegality is not raised by the pleadings: *Scott* v. *Brown*, [1892] 2 Q.B. 724, 61 L.J.Q.B. 738. The Courts will grant discovery in aid of the defence of illegality unless there are special circumstances of exemption: *Benyon* v. *Nettlefold* (1850), 20 L.J.C. 186, 3 Mac. & G. 94.

Money paid in consideration of an executory contract or purpose which is illegal, upon repudiation of the transaction may be recovered back, as upon a total failure of consideration; but it cannot be reclaimed after the happening of the event: *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291; *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548, 50 L.J.M.C. 145; *Hermann* v. *Charlesworth* (1905), 74 L.J.K.B. 620, [1905] 2 K.B. 123. Money deposited with a stakeholder upon a wagering contract may be reclaimed and recovered back after the event, at any time before the money

has been actually paid over; but not if the stakeholder has paid it over according to the event before his authority is revoked: *Howson* v. *Hancock* (1800), 8 T.R. 575.

The party seeking to recover money paid upon an illegal contract or purpose must give notice that he repudiates the transaction before it is executed, and reclaim the money, in order to entitle him to maintain an action; and merely bringing the action is not sufficient notice: *Busk* v. *Walsh* (1812), 4 Taunt. 290; *Palyart* v. *Leckie* (1817), 6 M. & S. 290.

After the execution of the illegal contract or purpose, money paid under it, whether as the consideration or in performance of the promise, cannot be recovered back; for the parties are then equally delinquent, and the rule applies that "*in pari delicto melior est conditio possidentis*": *Taylor* v. *Chester* (1869), 38 L.J.Q.B. 227, L.R. 4 Q.B. 313. The rule applies where the illegal purpose has been executed in a material part, though it remains unexecuted in another material part: *Kearley* v. *Thomson* (1890), 59 L.J.Q.B. 288, 24 Q.B.D. 742; and where it has been executed as far as possible, and further execution has become impossible: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616.

The true test for determining whether or not the plaintiff and the defendant were *in pari delicto* is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson* v. *Bloss* (1816), 7 Taunt. 246; *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291; *Hyams* v. *Stuart King* (1908), 77 L.J.K.B. 796, [1908] 2 K.B. 696. But in the case of purely equitable remedies, the Court may refuse its assistance to a *particeps criminis*, who does not rely upon any part of the illegal transaction, as a person invoking the jurisdiction of the Court of Chancery must come into Court with clean hands: *Ayerst* v. *Jenkins* (1873), 42 L.J.C. 690, L.R. 16 Eq. 27. Accordingly money lost fairly at illegal gaming or wagering, and paid, cannot be recovered back: *Howson* v. *Hancock* (1800), 8 T.R. 575; *Thistlewood* v. *Cracroft* (1813), 1 M. & S. 500; *Dufour* v. *Ackland* (1830), 9 L.J.O.S. K.B. 3. So with money paid or accounted for as the price of goods sold and delivered under an illegal contract of sale: *Owens* v. *Denton* (1835), 4 L.J. Ex. 68, 1 Cr. M. & R. 711. And money paid to induce a person to become bail for another cannot be recovered back, after the purpose is completed by acceptance of the bail, whether the principal makes default or not: *Herman* v. *Jeuchner* (1885), 54 L.J.Q.B. 340, 15 Q.B.D. 561. See *Consolidated Exploration Co.* v. *Musgrave* (1899), 69 L.J.C. 11, [1900] 1 Ch. 37, which is perhaps to be supported upon the ground that the transfer of shares was *ultra vires*, and the transferee a trustee for the company.

Where money was deposited with a company's banker for the purpose of giving the company a fictitious credit, it was held that after an order was made for winding up the company the money could not be recovered back: *Re Great Berlin Steamboat Co.* (1884), 54 L.J.C. 68, 26 Ch.D. 616. Upon this principle a premium paid upon an illegal insurance, after the

risk has determined, is not recoverable. though the underwriter cannot be compelled to pay the loss: Marine Insce. Act, 1906, sec. 84; *Vandyck* v. *Hewett* (1800), 1 East 97; *Allkins* v. *Jupe* (1877), 46 L.J.C.P 824, 2 C.P.D. 375; *Harse* v. *Pearl Life Assce.* (1904), 73 L.J.K.B. 373, [1904] 1 K.B. 558. But if the premium in such case has been paid or secured by a bill only, there is no remedy on the bill, being the security for an illegal debt: *Ex p. Mather* (1797), 3 Ves. 373. So an underwriter having paid the loss under an illegal insurance cannot recover it back; and though he has only paid it to the broker of the insured, who has not paid it over: *Tenant* v. *Elliott* (1797), 1 B. & P. 3.

Upon the same principle goods or other property delivered under an illegal agreement or for an illegal purpose, may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted. Where goods were delivered under a fictitious sale for the purpose of protecting the possession whilst the owner compounded with his creditors, it was held that he might repudiate the transaction before the composition had been carried out, and recover the goods from the pretended buyer, or from a subvendee to whom they had been delivered with notice of the illegal transaction: *Taylor* v. *Bowers* (1876), 46 L.J.Q.B. 39, 1 Q.B.D. 291.

But if the contract is executed and a property either general or special has passed thereby, the property must remain; and upon this ground a lien for work done upon a chattel, though under an illegal contract, is valid; *Scarfe* v. *Morgan* (1838), 7 L.J. Ex. 324, 4 M. & W. 270. Upon the same principle a conveyance of property executed upon trust for the absolute use of a woman, cannot be set aside upon the ground that it was executed in consideration of illicit cohabitation: *Ayerst* v. *Jenkins* (1873), 40 L.J.C. 690, L.R. 16 Eq. 275. See *Phillpotts* v. *Phillpotts* (1850), 20 L.J.C.P. 11, 10 C.B. 85.

No claim can be allowed for compensation or contribution between persons engaged in an illegal transaction: Jessel, M.R., *Sykes* v. *Beadon*, 48 L.J.C. 522, 11 Ch.D. 197. Where two persons had joined in an illegal wager which they won, and one of them advanced to the other his share of the winnings, which the loser failed to pay, it was held that he could not recover back the sum so advanced, because he could not maintain such claim except through the illegal contract: *Simpson* v. *Bloss* (1816), 7 Taunt. 246; Leake on Contracts, 6th ed., 569.

An exception to the rule, that money paid in execution of an illegal contract cannot be recovered back, is made where the party who paid the money acted under undue pressure or influence on the part of the receiver, and therefore was not *in pari delicto* with the latter: *Lowry* v. *Bourdieu* (1780), 2 Dougl. 468; *Williams* v. *Bayley* (1866), 35 L.J.C. 717, L.R. 1 H.L. 200; *Jones* v. *Merionethshire Perm. Bg. Soc.* (1891), 61 L.J.C. 138, (1892), 1 Ch. 173. And this rule has been applied to money extorted by an abuse of legal proceedings; as where a party paid a sum of money to obtain his release from an arrest under a colourable legal process: *De Cadaval* (*Duke*) v. *Collins* (1836), 5 L.J.K.B. 171, 4 A. & E. 858.

Another exception is, where a statute has been passed with the object of protecting a particular class of persons, the members of that class may recover payments made by them. Thus the fees of a sheriff are fixed by statute, and an overpayment may be recovered: *Woodgate* v. *Knatchbull* (1787), 2 T.R. 148, *Dew* v. *Parsons* (1819), 2 B. & A. 562. So money paid in excess of the legal interest allowed by the statutes against usury could be recovered back: *Ashley* v. *Reynolds* (1731), 2 Stra. 915; *Bromley* v. *Holland* (1802), 7 Ves. 3; as now is the case where a moneylender charges a higher rate of interest than the Court sanctions in an application under the Moneylenders Act, 1900 (Imp.): *Saunders* v. *Newbold* (1904), 74 L.J.C. 120, (1905), 1 Ch. 260, affirmed *sub nom. Samuel* v. *Newbold* (1906), 75 L.J.C. 705; [1906] A.C. 461.

Province of Manitoba.

COURT OF APPEAL.

PETITT *v.* CANADIAN NORTHERN R. Co. (No. 2).
(11 D.L.R. 316.)

Howell, C.J.M., Perdue, and Cameron, JJ.A.] [May 6.

Damages—Death—Pain and suffering—Accidental death—Recovery by decedent's family—Elements.

In an action by the widow and administratrix of the deceased for damages under the Manitoba Act, for compensation to families of persons killed by accident (R.S.M. 1902, ch. 31), the measure should be for the widow's pecuniary loss sustained because of the death, in a sum that will give her the physical comfort which she had at the time of her husband's death out of his labour earnings to be continued during the expectancy of life, subject to the accidents of health and employment; but not covering the physical and mental suffering of the deceased nor the mental sufferings of the plaintiff for the loss of her husband.

Blake v. *Midland*, 18 Q.B. 93, and *C.P.R. Co.* v. *Robinson*, 14 Can. S.C.R. 105, referred to; *Petitt* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.

Statutes—Statutes adopted from England—Effect of English decisions.

A statute practically copied from an English Act is taken subject to judicial decisions upon it given in England.

Trimble v. *Hill*, 5 A.C. 342, referred to; *Petitt* v. *Canadian Northern Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.

Damages—Death—Loss of services—Accidental death—Recovery by decedent's family—Excessiveness.

$5,000 is an excessive recovery by a surviving wife under the Manitoba Act (R.S.M. ch. 31) for accidental death of her husband, and the recovery should be reduced to $3,000, where he was 65 years old and earned only $45 monthly, and she was 57 years old, though he was apparently a strong, healthy man.

Rowley v. *London*, L.R. 8 Ex. 221, and *Lamonde* v. *G.T.R. Co.*, 16 O.L.R. 365, referred to; *Petitt* v. *Canadian Northern R. Co.* (No. 1), 7 D.L.R. 645, varied.

O. H. Clark, K.C., for defendants. *W. H. Trueman*, for plaintiff.

Province of Saskatchewan.

SUPREME COURT.

RE JOHN P. FRENCH.

(11 D.L.R. 379.)

Haultain, C.J., Newlands, and Lamont, JJ.] [April 10.

Land titles (Torrens system) — First registration—Failure to establish legal or equitable title.

Held, 1. Under the Land Titles Act, R.S.S. 1909, ch. 41, an applicant is not entitled to be registered as owner where he fails to establish that he has any estate either legal or equitable in the land in question.

2. In Saskatchewan, a Master of Titles has no jurisdiction, on a reference to him by a registrar, to pass upon and direct the registration of a title which depends for its validity solely on the application of equitable doctrines, since a purely equitable claim not evidenced by any document cannot be made effective until a Court of competent jurisdiction has declared the claimant entitled to an interest in the land.

William Beattie, for appellant. *A. E. Doak*, for respondent.

Book Reviews.

The Canadian Annual Digest, 1912. Toronto: Canada Law Book Co., Ltd. 1913.

This Digest contains all Canadian Reported Cases for last year. It is arranged according to the standard law classification inaugurated in the year previous. The system adopted is one that gives great assistance to the practitioner in looking up decided cases, so that he may know when he has exhausted all that are to be found in the reports. The permanent main titles and subdivisions are continued so far as the matter allows. The number feature in connection with this digest is helpful. The bracketed letters and numbers being permanent classification signs. An explanation of the system is given in the publishers' note. The profession will appreciate the care and thoroughness which characterize this digest.

The Law of Automobiles. By ZENOPHON P. HUDDY, LL.B., of the New York Bar. Third edition by HOWARD C. JOYCE. Albany, N.Y.: Matthew Bender & Company. 1912. Arthur Poole & Co., agents for Canada.

The "Road hog," as motors used to be called in England, a nuisance as well as a convenience, has come to stay. The value of this new mode of transportation is not confined to those who use them, for it has become a source of profit to lawyers and law publishers, as is evidenced by the fact that three editions of this work have been issued since 1906, indicating the amount of litigation which the vagaries of this new invention have given rise to. The author's work has met with the approval of the profession, and is one which every up-to-date library should have. A selection is given of Ontario cases; but we think a little more attention should be paid to this in a new edition.

Wertheimer's Law Relating to Clubs. By A. W. CHASTER, Barrister-at-law. Fourth edition. London: Stevens & Haynes, Bell Yard, Temple Bar. 1913.

Clubs are more in evidence year by year. The first edition of this book was published in 1885, and still another edition has now been called for. Every lawyer in this country may not need the book, but all law libraries will be expected to have it. The matter is excellently well put together.

Bench and Bar

Mr. A. H. O'Brien, who recently resigned his position as Law Clerk of the House of Commons, has been appointed Counsel to the Speaker of the House. This is the first time, so far as we can ascertain, that this title has been given in Canada, and although Mr. O'Brien has acted as the Speaker's Counsel for some time he is to be congratulated upon being the first Parliamentary officer to be given the title. Mr. O'Brien, who has been a law officer of Parliament for 17 years, was formerly assistant editor of this Journal and has always been a contributor. He is also well and favourably known to the profession as the author of "O'Brien's Conveyancer," the standard authority on that subject; also of "Barron & O'Brien on Bills of Sale and Chattel Mortgages," etc.

The position of general counsel to the Canadian Pacific is now taken, on Mr. Creelman's retirement, by Edward W. Beatty. The reputation which Mr. Beatty acquired for himself, both as a lawyer and as a business man, shews the wisdom of the company in appointing him to that very responsible and arduous position. Mr. Beatty was born at Thorold, Ont., in 1877, is a graduate of Toronto University, and hails from Osgoode Hall as his legal birthplace. He was called to the Bar in 1901. The same year went to Montreal, and became general solicitor of the C.P.R. in 1910. We predict a successful career for him in his new position.

We recently came across a statement of claim in which the following clauses occurred, and were stated in the words and figures following:—

"8. On or about the 29th day of August, 1910, the shareholders voted to reduce the directorate from 6 to 5, thus eliminating the victorious plaintiff.

9. Beath then sued on his 10,000 shares, similarly succeeded, and was also eliminated, after which Harris of Orillia was elected to take his place.

10. Maclennan having successfully sued, met the official axe, and the office of the company moved to Orillia.

11. Orillia proved too hot for the president and his henchmen, after Harris issued his writ against the company, and North Bay now is the head office."

Saunders, Stephen, Bullen, Leake, and Metcalfe, and all that race would turn in their graves were they to behold the heights, or shall we say, the depths, to which modern pleadings have come.

Such pleading as the above runs a close race with the rhetorical efforts of a former Irish member of the Ontario Bar, who was accustomed to startle and amuse the profession some years ago with similar feats of graphic pleading. The rapid way in which individuals are said to be eliminated and meet "the official axe" and "the hot time in the old town," so succinctly described betoken an exceptional genius for forensic pleading which is not too often met with—Why, because Maclennan was decapitated, "the company moved to Orillia" is not explained, and from an artistic point of view is very properly left to the imagination.

As we go to press word comes of the decease of Mr. John Westlake, K.C. Professor Westlake—for he will always be "Professor" in the minds of his old Cambridge pupils—was not only a distinguished lawyer: he had a spirit open to the appeal of every humane and liberal cause. His vast stores of learning were available to the inquiries of the veriest tyros in juridical science. His saturation in the legal atmosphere of Continental thinkers was (especially in a practising barrister) amazing. His sanity and balance were no less remarkable than were his enthusiasms. He protested equally against the Russian coercion of Finland and the Italian coercion of Turkey. As an original founder of the Institute of International Law, he was the doyen of international lawyers. It is nearly sixty years since, as a young wrangler, he wrote "A Treatise on Private International Law." For condensed hard thinking, scientific consistency, and cogent sense, the treatise has never been surpassed; probably never equalled. In the domain of public international law he was less successful. His extremely subtle intellect was less suited to grappling with broad questions of statecraft. But in that most difficult and delicate tissue of problems which is presented by the conflict of laws, he was unapproachable.—*Law Magazine and Review.*

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THE LAWYER IN LITERATURE.

This is the subject discussed by John Marshall Gest, Judge of the Orphans' Court, Philadelphia, in a book just published by the Boston Book Co. It consists of papers read before several Law Schools and Law Clubs in the United States, originally published in the University of Pennsylvania Law Review. Those who desire some very interesting and instructive reading would do well to obtain this volume; and, after reading the introduction thereto by John H. Wigmore, Professor of Law in the North Western University, they will be more than ever impressed with the desirability of, and the pleasure to be derived from, an adequate attention to general literature which bears upon professional matters apart from the study of reports and legal text-books. Mr. Wigmore's short paper is so suggestive that we give our readers the benefit of it, as follows:—

The compliment is an agreeable one, to be allowed to figure as the Introducer of so accomplished a legal scholar as the author of these essays. When they first saw the light in the Pennsylvania Law Review, I was among those who urged that they receive a more permanent form in our literature; and it is a satisfaction to see this proper destiny now shaped for them.

Who, that has already made acquaintance with these characters of the law in Dickens and the rest, will not take pleasure in comparing notes upon them with Judge Gest? Who, that has his favourites and his aversions among them, will not be interested in the author's new points of view, his fuller survey, his keen judgment, his trenchant wit, his generous sympathies, his illuminating comments?

And yet a main use of the book ought to be to send those readers to the originals who have never been there. Can a lawyer—I mean one of self-respect, of aspiration, of devotion to his art and science,— can he afford to ignore his profession as it is glassed in the literature of life?

Why should a lawyer, *as* a lawyer, be familiar with literature, particularly the literature of the novelists?

Well, in the first place, there are episodes of fact and types of character in professional life whose descriptions by famous novelists have become classical in literature,—Serjeant Buzfuz in *Pickwick Papers;* the Chancery suit in *Bleak House;* Effie Dean's trial in *The Heart of Midlothian;* and many more. With these every lawyer must be acquainted,—not merely as a cultivated man, but as one bound to know what features of his professional life have been taken up into general thought. "The first thing we do, let's kill all the lawyers!" said Dick the Butcher to Jack Cade. If you do not know, from your Shakespeare or elsewhere, that this sentiment was once—and more than once—a rabid popular demand, then you cannot gauge the possibilities of popular thought in these very days of ours.

Then, again, there is the history of law,—that is, the scenes and movements in legal annals which history has made famous. To know the spirit of those times—to realize the operation of the old rules now gone—to feel their meaning in human life—to appreciate the bitter conflicts and their lessons for to-day—this deepest sense of reality for the past we shall get only in the novels, not in the statute books or the reports of cases. It is one thing to read the trial of Lord George Gordon in good old Howell's State Trials, but it is a different thing to read about the very same events in *Barnaby Rudge.* We must go to *Bleak House* to learn the living meaning of Chancery's delays; to *Oliver Twist* to see the actual system of police justice in London; to *Pickwick Papers* to appreciate the other side of Baron Parke's technical rulings reported in Meeson & Welsby's volumes,—those sixteen volumes of which Erle said, "It is a lucky thing that there was not a seventeenth volume,—for, if there had been, the common law itself would have disappeared altogether amidst the jeers of mankind." Read Lady Lisle's trial by the savage Jeffreys, in Howell's State Trials, and then Conan Doyle's account of it in *Micah Clarke;* read some book on the early real property statutes of New York, and then Fenimore Cooper's portrayal of them in *Satanstoe* and *Chainbearer;* read the chill technical reports of bankruptcy pro-

ceedings in the Federal Reporter, and then Balzac's story of the downfall of *César Birotteau*. The living side of the rules of law is often to be found in fiction alone.

But there is a further service, and a higher one, to be rendered to the lawyer by literature. For literature, and especially the novel, is a catalogue of life's characters. And human nature is what the lawyer *must* know. He must deal understandingly with its types, its motives. These he cannot find—all of them—close around him; life is not long enough, the variety is not broad enough for him to learn them by personal experience before he needs to use them. For this learning, then, he must go to fiction, which is the gallery of life's portraits. When Balzac's great design dawned on him, to form a complete series of characters and motives, he conceived his novels as conveying just such learning. He even enumerated the total number of characters His task was, he says:—

"To paint the three or four thousand salient figures of an epoch —for that is about the number of types presented by the generation of which this human comedy is the contemporary and the exponent, this number of figures, of characters, this multitude of portraits, needed frames. Out of this necessarily grew the classification of my work into scenes. Under these heads I have classed all those studies of manners and morals which form the general history of society . . . If the meaning of my work is understood, my readers will see that I give to the recurring events of daily life (secret or manifest), and to actions of individuals, with their hidden springs and motives, as much importance as the historian bestows on the public life of a nation."

In this view, the work of the novelist is to provide a museum of human characters, traits and motives—just as we might go to a museum of zoology to observe an animal which we desired to understand but had never yet seen alive; this was Balzac's idea:—

"There have always been, and always will be, social species, just as there are zoological species. If Buffon achieved a great work when he put together in one book the whole scheme of

zoology, is there not a work of the same kind to be done for society? . . . There are as many different men as there are species in zoology. The differences between a soldier, a workman, a merchant, a sailor, a poet, a beggar, a priest, though more difficult to decipher, are at least as marked as those which separate the wolf, the lion, the ass, the crow, the shark, the seal, the lamb, and so on."

And so the lawyer, whose highest problems call for a perfect understanding of human character and a skillful use of this knowledge, must ever expect to seek in fiction as in an encyclopedia that learning which he cannot hope to compass in his own limited experience of the humans whom chance enables him to observe at close range.

This learning has been sought, possessed and valued by many great advocates. Perhaps they have seldom openly inculcated its value. But I know of one singularly direct exposition of this theme, which must here be quoted:—

"Read the literature of human nature . . . To my mind Balzac is the greatest judge of human nature, after Shakespeare. I think I learned more of human nature (outside of my own experience) from Balzac than I have from any other author except Shakespeare. I recall especially *Eugénie Grandet*, the history of a miser. I have read that book two or three times, and this is how it profited me afterwards. I was retained in a very serious case of fraud. I studied the party on the other side. I made up my mind that if ever there was a miser out of the pages in literature, that was the man, and that Grandet was his literary father-in-law. I studied *Eugénie Grandet* again, and then I attacked that opponent. It was an eight years' task. But the image of Grandet helped me to hound that man so, that at the end of eight years there was not anything left but his hide. The greatest admirer of the work I did is that man's own lawyer; but he will not give me credit for having any legal acumen. He maintains that I knew all the facts beforehand. Yet the truth of the matter was that I did not; I drew the bill before I had the facts. I merely judged the man's character from what I had read of *Eugénie Grandet*. That experience was to me a life lesson.

"Let me allude also to another case, one that nearly broke me down with the mental and physical strain. I had bought every printed trial I could find on that particular subject. I had a year to prepare for the actual trial of the case. There were very eminent lawyers on the other side. I will not mention names, for the parties are living. But I did not receive from all these books as much light as I did from a certain classical novel, one that characterized exactly the plaintiff's object and put that party in the lime-light. With that aid I was able to follow all the ins and outs of his maneuvers, and finally to win the case. It was a work of fiction that guided me to a right solution of that person's character, and a knowledge of his character that was essential to victory.

"Still another lesson I now recall which I learned from reading —a lesson I shall never forget. It relates to a gentleman by the name of Gil Blas. Gil had various and sundry adventures, and among others he was made secretary to the Archbishop of Toledo. The Archbishop said to him one day: 'Gil, I look upon you as a very likely young man, I like your intelligence and acumen. Now I am getting old. I have to preach once a month. Make it your duty to let me know when you see any failing signs in my mental powers. I will trust you as a friend to tell me about it.' So Gil noted the character of the sermon the next month. Then he heard the ensuing sermon; and he thought the Archbishop showed signs of age and senility. At the third sermon he was more satisfied of this, and the fourth was shockingly significant. He complimented the Archbishop on the first sermon, and spoke fairly of the second, but of the others he did not. The Archbishop asked, 'Now, Gil, what is the truth?' Gil said: 'Your Eminence, your mental powers are failing rapidly.' 'Gil,' responded the Archbishop, 'I find that I am mistaken in your acumen. The treasurer will pay you and you will leave the house.' I have never forgotten the moral of that story. Such incidents of literature add to your knowledge."

And so the best literature—drama or poetry, philosophy or fiction—must always be an arsenal for the lawyer. That is why I offer the hope that this volume may whet the zest of all devoted members of our profession to follow the example of our author, and to seek in literature its manifold message to the lawyer.

TRADITIONS OF PARLIAMENT.

We received a letter from a valued correspondent who writes as follows:—

"In your editorial entitled, 'Traditions of Parliament' you ask, Why choose the stock of a company with which the Government of which they were members was actually in negotiation or had been or might be? As I understand such reports of the investigation into the Marconi case as I have seen, the American Marconi Company, whose shares were bought by Mr. Lloyd George and Sir Rufus Isaacs, was not a company with which the Government of which they were members was actually in negotiation or had been or might be, but a distinct and unrelated company whose shares might be expected to advance in synchrony with those of the English Marconi Company, because of the similarity of name, and the inducement to buy them was a broker's tip. If I am right, your insinuation is unfair; if I am mistaken, I wish you would point out to me the evidence for my correction."

It seems to us that our correspondent himself supplies the answer to his objection to our criticism. Whilst it is true that the British Government were not distinctly negotiating with the American Company in which the Attorney-General and Mr. Lloyd George had taken shares, it was nevertheless a company which would probably be indirectly affected by any action of the Government of which they are members. The better the condition of the company with which the Government was negotiating the more valuable would become the shares taken in the company which was in sympathy with it. In truth, our correspondent, without, perhaps, intending it, advances a strong argument to shew that the action of these ministers was most unfortunate; and as *The Times* said, "they made a mistake in walking into a puddle which might easily have been avoided." We agree with the opinion expressed by that writer that a frank acknowledgment of the mistake, with the procedure known as throwing yourself on the mercy of the Court, would have made a better impression on the public.

REPRESENTATION OF DEFENDANTS IN TRADE UNION ACTIONS FOR TORT.

By the Trades Union Act (R.S.C. c. 125) certain acts which at the common law were illegal as being in restraint of trade, are made lawful, but by s. 4 no legal proceedings can be taken to enforce or carry out such acts. The formation of trade unions is authorized, and associations of this kind can be legally formed, which sometimes exceed their powers, and in pretended furtherance of their objects inflict serious injuries on individuals. It is quite obvious that if the service of every member of a trade union, which has authorized and carried out a wrongful act, were a necessary preliminary to obtaining compensation at law for such injuries, the person wronged would be practically without redress, and the law would have created a legal monster which it was incapable of controlling. To make one person responsible for the wrongs done by others, to which he has not assented, is repugnant to legal principles. Where a tort is committed all who aid or counsel, direct, or join in the commission of the tort are joint tortfeasors, and as such liable to the person wronged; but how far can members of a society not formed for the commission of any unlawful act, and who do not actively aid, counsel, direct or join in the commission of the wrong, be held responsible for the acts of those members of the association who do, as members and officers of such association counsel, aid, or abet the commission of a wrongful act? It may be said all such acts are ultra vires of the association, and only those who take part in them are legally liable for the wrong done. At the same time the fact remains that the funds and organization of the association are used for the purpose of carrying out the illegal act. The wrong is done and often at the instance of persons who are individually worthless, and unless the funds of the association can be made answerable no efficient remedy can be obtained. The *Taff Vale Railway* case hereafter referred to is supposed to have established that the funds of such an association can be made liable to answer for damages so inflicted and that by means of a representative action.

The practice relating to representative actions originated in Equity, in cases where, owing to the multiplicity of parties, it would be impossible to carry on a suit if all persons interested had to be made plaintiffs or defendants. In such cases the plaintiff might sue on behalf of himself and all others in the same interest, respecting some right to property, and a defendant might be sued as representing himself and all others in the same interest. But where any relief was granted in which the unrepresented parties were individually concerned, they would ordinarily be made parties at a later stage in the suit. Administration and partition suits are familiar examples of this procedure. Any person who was required to account, or against whom any personal relief was sought, was always required to be made a defendant prior to the hearing. In suits against companies, the shareholders were never made defendants in the first instance, but where a judgment recovered against a company remained unsatisfied, and it was desired to levy execution against shareholders, sci. fa. proceedings were necessary. This procedure consisted of a writ directed to the shareholders against whom execution was sought to be issued, calling on them to shew cause why execution should not issue against them. To this writ no defence which could have been set up to the original clause of action could be made. The only question being whether or not the party served was a shareholder and whether or not, as such, he was indebted to the company, and if so, to that extent execution might be awarded against him, so far as necessary to satisfy the judgment.

The method of procedure by representation was unknown to the common law. At law all persons against whom an adjudication was sought were required to be made defendants in person, and there was no such thing known to common law practice as a suitor, whether plaintiff, or defendant, representing anybody but himself.

But the Judicature Act not only perpetuated the equity practice as regards representative actions where rights of property are concerned, but also extended it to actions of a purely common

law character, as for instance actions to recover damages for tortious acts committed by a combination of many persons.

In suing a trade union for a tort a plaintiff is met with the difficulty that the union is not a corporation and cannot be sued as such. It has a recognized legal status, and is possibly a quasi corporation to the extent that it may be sued by its name: see *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1901) A.C. 426; 85 L. & T. 147, and yet it does not possess the legal attributes of a corporation so that it can be sued effectively by its name so as to bind its property. Very often as far as property is concerned the union is nothing but a name, "the collective name of all the members," as Lord Macnaghten said in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants,* supra. Usually its property is vested in individuals as trustees, and in order to reach the property of the union it is necessary that such trustees should also be made parties to the action. In a recent case of *Robinson* v. *Lawrence,* referred to in the *Law Times,* an action was brought in England to recover damages from a certain named defendant, and against a society, for wrongfully and maliciously conspiring and combining to procure certain members of the society to commit damage. In the action the society was represented by one of its leading members, and the jury returned a general verdict against all the defendants including the society. In the same way a trade union may be sued. But the difficulty in the way of making the property of a trade union answerable for its torts is well illustrated by the *Metallic Roofing Co.* v. *Local Union No.* 30, 5 O.L.R. 424; 9 O.L.R. 171, and see S.C. 10 O.L.R. 108. The trade unions sued in that case were not registered under the Trade Unions Act, one being a general association of the metal workers of the United States and Canada, and the other a local union or branch of the general association; and it was held by the Court of Appeal that they were not corporations, nor quasi corporations, nor partnerships, and were not capable of being sued and served with process as such in the ordinary way; but it was held that both associations could be sued in respect of wrongs committed within the juris-

diction in a representative action under Rule 200. The action accordingly proceeded and a judgment for a large amount was recorded, but was subsequently set aside by the Judicial Committee of the Privy Council: *Jose* v. *Metallic Roofing Co.* (1908) A.C. 514, and a new trial ordered on the ground of misdirection, The case, we believe, was subsequently compromised; but the difficulty in the way of the plaintiffs collecting the judgment, if it had been upheld, was shewn by their unsuccessful effort to collect certain costs which were ordered to be paid them in the course of the action. Both unions and certain members of the unions were named as defendants and by an order of the court those named were ordered to represent all other members of the unions. The defendants were ordered to pay the costs of an unsuccessful appeal, and not having paid them the plaintiffs obtained an attaching order against certain moneys in a bank to the credit of one of the unions and officers of the union, but on an application to pay over the Master in Chambers refused the order; he was reversed by Anglin, J., who in turn was reversed by a Divisional Court (Meredith, C.J.C.P., and Britton, and Teetzel, JJ.). The learned chief justice who delivered the judgment of the court said: "The members of the Local Union, other than those named as defendants are not parties to the action; they are represented no doubt, by the members who are defendants, and will be found by whatever judgment may be ultimately pronounced as if they had been named as parties defendants, and as I have said that being the case *the court may be enabled to pronounce a judgment which will render the property of the Local Union answerable for the judgment debt and costs* if the respondents shall succeed in the action; but I am unable to understand how A., B. and C., being defendants and an order having been made that they shall represent all other members of a class, an order that the defendants shall pay money, whether it be for damages or costs, without more, can be enforced by execution, or process in the nature of execution, against the property of anyone but A., B. and C. In other words, how an order that A., B. and C. shall pay money, can be treated as

an order that they and the other members of a class for which they have been authorized to defend, shall pay it." The learned Chief Justice intimates that the court may be enabled in such a suit to pronounce a judgment which will find the property of the persons responsible, but how it is to be done, he does not explain. His reasons for allowing the appeal would appear to shew that all such actions are really futile, and that the order for representation is really a delusion and a snare and accomplishes nothing effective, and is merely a prelude to endless litigation; for if the parties ordered to be represented are not bound by an adjudication as to costs, it is hard to say how they could be bound by an adjudication as to damages. According to his view because they were not actually parties they were not liable to execution. The inference from his judgment appears to be, therefore, that after judgment has been obtained, then all the members of the union against whom execution should be desired, or interested in property sought to be made liable to answer the judgment, would have to be first made parties. For this the proceedings by *sci. fa.* in the case of shareholders seems to furnish some analogy.

This may possibly be the "something more" to which the learned Chief Justice refers. The parties represented are bound as the shareholders of a company are bound by a judgment against the company, but before they can be individually compelled to pay or their property be attached to answer the damages or costs, it would seem as if they must be individually brought before the court and called on to shew cause why execution should not issue against them for damages and costs incurred in the action in which they have been represented as defendants. If such is the procedure the learned Chief Justice contemplates as necessary before any person, not actually a party, can be made answerable, it will be seen that any attempt to make a trade union or its members individually liable for wrongs perpetuated by the union will generally involve an intricate, protracted and costly litigation.

In the *Taff Vale Railway* case, supra, the trade union was made a defendant, and an application to strike out its name was made,

and refused. The judgment in that case, as affirmed by the House of Lords, was for an injunction and costs. Lord Lindley said he had no doubt that if the union could not be sued in its registered name some of its members (viz. its Executive Committee) could be sued on behalf of themselves and the other members of the society, and a judgment for damages could be obtained, in a proper case in an action so framed. And that if the trustees of the property of the union were made parties an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the union. He also remarked that a judgment against a trade union could only be enforced against the property of the union and that to reach such property it may be found necessary to sue the trustees. These observations are obiter, but they are made by a judge who is a distinguished authority on partnership and company law. His view would appear to be similar to that of the learned Chief Justice of the Common Pleas, namely, that in order to make any person individually liable for a judgment recovered in a representative action he must in some way be made an actual party to the proceedings. If the property of an union is sought to be made answerable then the trustees in whom that property is vested must be made actual parties defendant. But even in this view of the matter it appears to us that the garnishee proceedings in *Metallic Roofing Co.* v. *Local Union*, 10 O.L.R. 108, ought to have succeeded on the merits.

The application may have been defective for want of parties, but if so the proper parties should have been ordered to be notified. It would appear that the money in question was standing in a bank to the credit of "The Amalgamated Sheet Metal Workers' Union, No. 30. Alex. McKay, president, W. C. Brake, recording secretary, and R. Russell, treasurer," and to the credit of the defendant William Jose—all of these parties except McKay were actually named as defendants and ordered to pay the costs in question. And they were the parties who resisted the application to pay over. As far as they were concerned they had really no defence to the motion. Their objection really amounted

to no more than this, that other persons were interested in the funds; but those other persons were persons whom the defendants were ordered to represent in the action. It is difficult to understand why the order to represent absent parties was sufficient to warrant the defendants in representing the absent parties for the purpose of enabling a final judgment to be recovered which would be binding on the absent members of the class and yet not equally sufficient to enable them also to represent the absent parties for the purpose of the application to pay over the money in which it was not pretended that they had any special or different interest other than that of all other members of the union ordered to be represented by the actual defendants before the court.

The plaintiff had recovered a judgment for costs against parties who represented those whose property was sought to be attached. The only defence to that motion which appears to us to have been properly open to the defendants was whether or not the parties interested in the money sought to be attached, were members of the class represented by the defendants ordered to pay the costs in question. And the answer to what appeared to the learned Chief Justice an incomprehensible situation appears to be self-evident. The judgment for costs was against A., B. and C., representing also D. D., therefore, was liable for the judgment as well as A., B. and C., and a debt owing to D. was, therefore, properly attachable to answer the judgment on notice to A., B. and C., who represented D. If A., B. and C. could have shewn that D. was not a member of the class, A., B. and C. were authorized to represent, that would clearly have been an answer. But the answer which the court held to be good, viz., that he was not actually named as a party ordered to pay, appears in the circumstances wholly insufficient in law if a representative action for tort is to be of any practical value whatever. Such an action certainly seems to fail of its purpose, if, after judgment has been recovered for damages and costs, the plaintiff is to be told you cannot recover your damages or your costs against any one who is not actually named as a party, or made a party by some further proceeding.

EVOLUTION IN ANNOTATION.

By HENRY P. FARNHAM, M.L.

A report of a law case which makes no pretension to being annotated to-day is almost as rare as was the case which was annotated thirty-five years ago. The theory seems to prevail that the duty of a reporter is not done if he merely furnishes a correct copy of the opinion with accurate head-notes, adequate statement of facts, and helpful excerpts from briefs. He must, in addition, give the reader some additional light upon the problems solved by the court by reference to other cases in which the same or similar problems were involved. The spirit which animates this additional matter is good in all cases, and when the publication is sold, largely because of its annotation, it is necessary. While a judicial decision is now, as always, an application of a principle to a given state of facts, the modern lawyer is not satisfied with one elucidation of the principle, no matter how accurate and profound, but he wishes to know how other courts have dealt with the same question, even when he himself is capable of discerning the principle and reasoning to a proper conclusion the question of its applicability to particular states of fact. If he is not capable of thus reasoning as to principle, he insists upon knowing the various conclusions which have been reached in cases presenting similar facts, and to be given the opportunity of counting the decisions upon the respective sides so as to know what the weight of the authority is. Aids to this knowledge are, therefore, welcome and more or less helpful, according to the fullness and accuracy of the information conveyed. To furnish these aids, annotation is furnished. This is of many varieties and many degrees of excellence. That requiring the least effort, and costing the least money, is composed of references to places where cases have been gathered either in notes to other reports and text-books, or in digests. The value of this annotation depends entirely upon the quality of the work to which reference is made. If it is to a carefully prepared and exhaustive collection of cases which are fully set out, accurately

classified and distinguished, it may be very helpful in pointing the reader to the place where he will find a solution of his problem. If it is to a mere collection of cases which are not classified or distinguished, it may save a little time by relieving the reader of the necessity of searching through books of reference for himself, but he is still left to do most of the work in examining original sources and ascertaining the true force and value of the cases cited. If it is to a section of digest, it merely saves him the time which would otherwise be required to turn to the scheme of the subject in the digest to ascertain which section deals with the subject-matter under examination which, when found, is the mere crude material from which briefs, reports and annotation proper is made; for experience shews that as cases are collected in a digest section, with nothing to shew their distinguishing or harmonizing features, the material found is little better than a reference to so many cases to look up.

Another class of annotation which is of value within certain narrow and well-defined limits is that which shews where the reported case has been cited, criticized, followed, explained, distinguished, or overruled. This class of annotation has two principal values: First, it shews how the case under consideration has been treated by other courts, and, therefore, to an extent, its value as a precedent; and, second, it sometimes, in cases containing novel points, assists in finding other similar cases which might not be readily found in the ordinary reference books. If the citing cases are unclassified, the reader may have to examine a large number of references without finding anything of value to him, the citations being to minor or unimportant points in the cases. This annotation is more valuable if the citing cases are classified, but a serious objection to it is that it is likely to furnish only cases in harmony with the case under consideration, and thereby mislead by failing to disclose what there may be on the other side. If this annotation is properly classified, and its limitations are kept in view, its value is sufficient to justify its addition to the library.

Another class of annotation consists of a collection of leading

or important cases more or less in point with the case reported. This annotation is usually prepared by the judge writing the opinion, or by the official reporter of it. Its value depends upon the care with which the cases are chosen, and the fullness and accuracy with which they are set out, the value increasing as the necessity for consulting the original reports diminishes. Of slightly more value is the annotation which purports to be an exhaustive collection of the cases in point, arranged in a few general groups, with now and then an illustrating case set out fully enough to illustrate the general application of the principle involved. Experience teaches that few cases are actually on all fours with respect to the point actually decided in them. Many may be found which will lay down the same broad principle as a basis for reasoning, or as leading to the conclusion reached; and when many cases are found grouped under one proposition, examination will disclose that the reader receives little aid beyond ascertaining the general subject to which they relate, and that he must examine them, case by case, to learn what application was made of the principle involved, and whether or not it is of value in the solution of his problem. Such general grouping can be easily and quickly done, but, unfortunately, it leaves the reader to perform the real work himself, telling him only what cases to include in his examination.

Much more useful than the above is the annotation prepared by the competent text writer, based on elucidation of the principle involved in the decision under review, illustrated and fortified by well-reasoned cases. This annotation seldom purports to make an exhaustive collection of cases upon the subject, but intends to utilize the leading ones, and so illuminate and expound the principle involved that the reader will have difficulty in determining its scope and applicability, and will be able to settle his own problem whether he finds a case directly in point or not. Such work requires ability of a high order, incessant study, and a judicial temperament. Few annotators can produce satisfactory work of this kind.

The highest evolution in annotation, and that which the best

publishers are more and more nearly approaching, begins with an absolutely exhaustive collection of the cases bearing upon the subject in hand, and a search for the underlying principles which should be applied to its decision. From the cases collected is prepared an elucidation of the principles involved, so clear that the reader will have no difficulty in determining what the law is, and why, setting out each case fully enough to indicate how the principle was applied in it, and just what it is worth as a precedent, indicating the best-reasoned cases, and those decided by the strongest judges, so as to enable the lawyer or judge to examine the fewest cases possible in the preparation of brief or opinion. All cases are so classified, harmonized and distinguished that the needed one may be found in the shortest time, and if any reason exists why a particular one should or should not rule the one under consideration that reason is plainly pointed out. This gives ample scope for the profound study and constructive ability of the text-book writer, and the exhaustive and painstaking care of the case lawyer, and furnishes to the profession a combination of principle and case which is of the highest value. This is modern annotation in the true sense. By way of emphasis, this kind of annotation may be compared with the work of the digester. A digest paragraph is a mere index of the case for which it is prepared, without any thought of its relation to other cases upon the same subject. It is prepared not to shew the principle involved, but the mere accidents of the case as indicated by its facts. The result is that cases based upon the same principle may be so classified as to be found under different titles in the digest. A digest section, therefore, may not only not refer to all the cases which ought to be consulted to know the law with which it purports to deal, but even the cases which it does contain are not prepared for the purpose of shewing the law, but to shew what the decision was on a particular state of facts. One can gain little more comprehensive knowledge of a subject by reading a section of a digest than he could gain from a book by reading its index. Annotation states the law; a digest shews where one can find the law. A digest is a valuable aid in

doing one's own work; annotation does the work for him. Annotation of this last type requires experience and ability for its preparation. Twenty-five years ago the best editors in the country said it was impracticable, and could not be furnished. But when human effort was satisfied with nothing less than its ideal in other lines, progressive editors said, having seen this ideal, we will be satisfied with nothing less. To realize how far they have traveled towards this ideal, it is only necessary to compare annotation produced thirty years ago with the best produced to-day. One buying reports as such should thankfully receive such aids in the form of "annotation" as are furnished him, because he is getting therefrom much help gratuitously, but if he is buying annotation as well as reports he should select that which most nearly approaches the modern ideal above described. —*Case and Comment.*

EXTRA-TERRITORIAL CRIMES.

As appears from the report recently issued, the jurisdiction of the English courts to deal with crimes committed abroad was the subject of consideration by the Select Committee of the House of Commons on the Putumayo Atrocities. This power was found to exist to a limited extent only, and to be confined to certain special classes of crime, which by statutory enactment are made punishable if committed by British subjects. Apart from statute such a power is unknown to the law of England, which is only concerned with acts which occur within the United Kingdom. And even where Parliament has assumed to legislate in respect of matters occurring outside the kingdom, the principles of international law must be taken into consideration in fixing the limits of the particular enactment. The comity of nations would forbid any attempt by one state to claim the right to punish members of another state for crimes committed within the confines of their own country. But the same objection would not arise if a state should decide to make its own subjects amenable to its own courts for crimes committed abroad.

Thus the French code provides that a Frenchman who has rendered himself guilty abroad of a crime punishable by French law may be prosecuted and judged in France, unless he has previously been definitely judged in the foreign state. England on the other hand, only claims the right to exercise jurisdiction over British subjects in certain special cases. The principle upon which English criminal jurisdiction is founded has been well expressed by Lord Halsbury in the case of *Macleod* v. *Attorney-General for New South Wales* (65 L.T. Rep. 321; (1891) A.C., p. 458), where he says: "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever." The real objection to a wide extension of the jurisdiction even over British subjects lies rather in the difficulty of procuring the attendance of witnesses from foreign countries, who after all could not be compelled to attend. And there is always a risk, which no state would willingly incur, of there being the appearance of an interference in the internal affairs of another country. The matter might well be considered to be a question of police more properly to be dealt with by the state where the crime was committed.

The exceptional cases where the English courts have the power to try British subjects for crimes committed abroad are all the result of statutory provisions carefully limited in their scope. One of the earliest instances of such a statute is the Act of 35 Hen. VIII. c. 2, which provides that a person guilty of treason outside the realm may be tried for his offence in the Court of King's Bench. The gravity of this offence, directed as it is against the state itself, and the necessity of preventing plots being hatched abroad which would endanger the safety of the realm necessitated British subjects at least being made amenable to our courts. It has not been deemed advisable to follow the example of some continental states who even claim to exercise this right against foreigners. By 51 & 52 Vict. c. 41, s. 89 (3), the venue for treasons committed abroad is in the county of London and the county of Middlesex, and this was where the venue was laid in the case of Arthur Lynch, an Irishman, who joined the

Boer forces during the South African War, and was afterwards tried at Bar: *cf. Rex* v. *Lynch*, 88 L.T. Rep. 26; (1903) 1 K.B. 444.

The trial of persons for murder or manslaughter committed on land outside the King's dominions or for being accessory thereto is now provided for by s. 9 of 24 & 25 Vict. c. 100, by which British subjects are made amenable to the English courts, whether or not the person killed was a British subject. This is a consolidating statute, which incorporates the provisions of the previous Acts, commencing with 33 Hen. VIII., c. 23, which had given the English courts this jurisdiction. By this law if two Englishmen arranged to go abroad to fight a duel and one of them were killed, the survivor could be tried for murder on his return to this country. Further, if British subjects were proved to have made themselves parties or accessories to the murders alleged to have been committed in the Putumayo or elsewhere, they would now be amenable to the English courts. Similarly under the provisions of the Acts for the suppression of the slave trade, now largely consolidated in 32 & 33 Vict. c. 2, a British subject who by any overt act made himself a party to any offence under these Acts could be tried and punished here, wherever his offence had been committed. The extensive provisions of these enactments reflect the practically unanimous determination of all civilised states to put an end to the traffic in slaves. Slave trading is treated as akin to piracy and as an offence which should be suppressed by co-operation between the nations. No doubt was felt by the committee of the House of Commons that slave-raiding and slave-driving and other forms of dealing in slaves, if indulged in by a British subject, would render him amenable to the English courts, although a restatement of the law was deemed desirable. They further recommended that the existing provisions of the law might be somewhat extended so as to cover the gravest offences against the person and any practices of forced labour which are akin to slavery. It is not clear what is meant by the expression "the gravest offences against the person." Murder and manslaughter committed abroad by a British subject are already triable here, and it can scarcely be intended to include

among offences to be made triable here assaults, however grave, which are not in some way connected with slave-dealing which is already punishable. With regard to forced labour, what the committee had in mind was a practice said to have been prevalent in the Putumayo. The Indians, having been recruited by force and "reduced to obedience," were set to collect rubber. Advances of European goods were made to them, and they were then regarded as debtors to their employers and forced to work off their debts in rubber. This system of debt bondage, known as peonage, was made an offence, triable in this country, by s. 2 of the Slave Trade Act, 1843 (6 & 7 Vict. c. 98), if practised abroad by British subjects.

This particular section of the Act was included in the schedule of the Statute Law Revision Act, 1891, and was expressed to be "repealed as to all Her Majesty's dominions." The effect of these words would seem to be to leave it remaining as an offence of committed elsewhere than in the King's dominions. For if they were not intended to qualify the extent of the repeal of the section, there would have been no need to insert the words. Piracy, which is an offence by the law of nations, was formerly triable by the Court of Admiralty as coming within its own jurisdiction whether committed by persons or ships of any or no nationality. A consideration of what amounts to piracy is to be found in the case of *Attorney-General for the Colony of Hong Kong* v. *Kwok-a-Sing*, 29 L.T. Rep. 114, L. Rep. 5 P.C. 179. This and all other offences formerly triable by the Court of Admiralty are now by the Criminal Law Consolidation Acts of 1861 brought within the jurisdiction of the ordinary criminal courts of this country.

The policy of preventing British subjects joining in expeditions against friendly states, and thus endangering our relations with them, made it necessary that the courts should have the power of punishing such acts even when committed, as might well be the case, outside the King's dominions. The provisions of the Foreign Enlistment Act, 1870, 33 & 34 Vict. c. 90, accordingly cover offences by a British subject wherever committed. A famous instance of the prosecution of British subjects under

this Act occurred after the Jameson Raid, when Dr. Jameson and others were tried in London for taking part in an expedition against the Transvaal. This is reported as *Reg.* v. *Jameson and others*, 75 L.T. Rep. 77, (1896) 2 Q.B. 425.

By 24 & 25 Vict. c. 100, s. 57, a British subject who contracts a bigamous marriage in any part of the world is triable in England for the offence. In the case of *Earl Russell* 85 L.T. Rep. 253, (1901) A.C. 446, the offence consisted in going through a form of marriage in Nevada, in the United States, after the defendant had obtained from a court of that state a decree of divorce which was held invalid in England.

The Explosive Substances Act, 1883, 46 & 47 Vict. c. 3, was passed at a time when the country had been deeply stirred by the outrages of the dynamitards, and it was felt that the Act would not be completely effective if it were confined to offences committed in this country. Hence its provisions were drawn to cover offences by British subjects wherever committed, and they are made amenable to the English courts. This was, perhaps, an extension of the principles prompting the previous enactments, but the offences were probably regarded as being directed against the state, and as somewhat analogous to treason.

Similar considerations apply to the passing of the Official Secrets Act, 52 & 53 Vict. c. 52, which covers offences of espionage and breaches of official trust. British officers or subjects are amenable to the English courts for any offence under that Act, even if committed outside the King's dominions.

The provisions of the Commissioners for Oaths Act, 1889, 52 & 53 Vict. c. 10, which enable consuls and consular agents to administer oaths and take affidavits, and do any notarial acts in foreign countries, provide that perjury or forgery in connection therewith shall be punishable in the United Kingdom. These proceedings being exclusively confined to British subjects in relation to matters within the cognisance of English courts, do not in any way encroach upon the rights of foreign states in respect to offences against their own laws. See, too, s. 1 of the Perjury Act, 1911.

Similar provisions are contained in the Foreign Marriage Act, 1892, 55 & 56 Vict. c. 23, which render a British subject amenable to the English courts who makes a false oath or signs a false notice for the purpose of procuring the solemnisation of a marriage before a British representative abroad.

A review of these statutes shows the limited extent to which the Legislature has seen fit to claim jurisdiction over British subjects in respect of crimes committed abroad; nor is it likely that we shall see a departure from the settled policy so far observed, which is eminently characteristic of English views as to the proper scope of criminal law.—*Law Times.*

On a previous page (p. 438) we published Hon. Mr. Justice Middleton's introduction to the new Rules of Practice prepared by him. By proclamation of the Lieutenant-Governor, published in the *Ontario Gazette* of August 2, the Rules of Practice and Procedure so prepared by Mr. Justice Middleton, under instructions from the Attorney-General, and approved by Order in Council dated July 11, are to come into force on and from the first day of September next, and are to have the same force and effect as if they had been embodied in the Act respecting the Supreme Court of Ontario and the administration of justice in Ontario, and section 102 of that Act shall after that date no longer remain in force.

REVIEW OF CURRENT ENGLISH CASES.

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WILL—CONSTRUCTION—GIFT OF RESIDUE TO FORTY-SIX NAMED PERSONS—CODICIL REVOKING GIFT TO TWO OF NUMBER—CONFIRMATION OF WILL—INTESTACY.

In re Whiting, Ormond v. *De Launay* (1913) 2 Ch. 1. This was a summary application for the construction of a will made in 1906, whereby the testator gave his residue to be divided equally between forty-six named persons. By a codicil he revoked the gift to two of these persons, and in other respects confirmed his will. The question was, whether as to the shares revoked, there was an intestacy. *Cheslyn* v. *Cresswell,* 3 Bro. P.C. 246, was relied on, but Joyce, J., was of opinion that the facts not being the same as in that case, it was not binding; that the effect of the confirmation of the will by the codicil was to make the will speak as of the date of the codicil, and therefore that there was no intestacy.

WILL — CONSTRUCTION — HOTCHPOT — SUPPLYING OMISSION OF HOTCHPOT CLAUSE BY INFERENCE.

In re Haygarth, Wickham v. *Haygarth* (1913) 2 Ch. 9. In this case the construction of a will was in question, whereby the testator directed three several sums which he charged upon his real estate, to be raised and held upon the ordinary trusts of a settled legacy, in favour of his five cousins, including Fredericka, Georgina, and Katharine. Subject to this charge he devised his real estate upon an ultimate trust for sale, the proceeds to be divided equally between his five cousins as should be living when the trust for sale came into operation, but subject to the following provision for hotchpot: "but so that, if 'F., G., and K.,' or any of them shall then be living, or shall have previously died, leaving issue then living, such of the said sums hereinbefore directed to be set apart for their benefit as shall have been so set apart for the benefit of the one or more of them so dying, and her issue shall be brought into hotchpot and accounted for in the division hereby directed to be made of the net proceeds of my family estate." The will contained a subsequent provision that the child or children attaining twenty-one, or, if daughters, marrying, of such of his five cousins as should be dead when the trust

for sale came into operation, should take the share in the net proceeds of his family estate, which his, her, or their parent would have taken, if such parent had not died before the trust for sale came into operation. Katharine died before the trust for sale came into operation, leaving a child still living, and the question was, whether Fredericka and Georgina, as well as Katharine's child, were bound to bring into hotchpot their settled legacies, for the purpose of the division of the proceeds of the sale of the family estate. Joyce, J., decided that they were, and that the latter portion of the hotchpot clause must be read as applying to each of the two contingencies mentioned in the introductory part of the clause.

MORTGAGE—EQUITABLE MORTGAGE BY DEPOSIT—SUBSEQUENT LEGAL MORTGAGE SUBJECT TO PRIOR CHARGE—NO NOTICE TO FIRST MORTGAGEE—FIRST MORTGAGE PAID OFF—TITLE DEEDS HANDED TO MORTGAGOR—SUBSEQUENT PLEDGE OF DEEDS—PRIORITY.

Grierson v. *National Provincial Bank of England* (1913) 2 Ch. 18. This may be regarded as an illustration of the equity doctrine that, where the equities are equal, the law must prevail. The facts were somewhat peculiar. The owner of a leasehold deposited the lease with a bank, by way of equitable mortgage; he subsequently made a legal mortgage of the lease to the plaintiff, subject to the prior charge. The legal mortgagee did not give notice of his mortgage to the prior chargee. Subsequently the mortgagor paid off the prior equitable mortgage, and obtained possession of the title deeds, these he subsequently deposited by way of equitable mortgage, with the defendants, who had no notice of the legal mortgage. The question in the action was whether, in the circumstances, the plaintiff was entitled to priority over the defendants' mortgage; and Joyce, J., held that he was.

COMPANY—WINDING-UP—COSTS OF UNSUCCESSFUL LITIGATION—PRIORITIES.

In re Pacific Coast Syndicate (1913) 2 Ch. 26. This was an application by a creditor of a company for payment by the liquidator, of certain costs out of the assets of the company, in priority to the costs of liquidation. The liquidator had brought an action in the name of the company claiming an injunction against the applicants, and failed, and had been ordered to pay

the costs. The applicants had notified the liquidator not to part with any of the assets of the company until their costs were satisfied. The costs were taxed at £300; at the date of the judgment the liquidator had on hand £500, out of which he paid to his own solicitors £375 for their costs in the action, and sent the applicants a cheque for the balance. The applicants claimed to be entitled to be paid in priority to the liquidators own solicitors, and Neville, J., upheld that contention, and held that the rule was the same both in compulsory and voluntary litigation.

INSURANCE OF MORTGAGE OWNED BY A COMPANY—CONDITION THAT POLICY SHOULD CEASE IN CASE OF ALIENATION "OTHERWISE THAN BY OPERATION OF LAW"—INSURED COMPANY IN LIQUIDATION—POWER OF LIQUIDATOR TO ASSIGN.

In re Birkbeck Building Socy., Official Receiver v. *Licenses Insurance Corporation* (1913) 2 Ch. 34. The facts of this case were as follows. The Birkbeck Building Society had advanced £9,000 on mortgage. It had insured the due payment of the mortgage money by a policy of the Licenses Insurance Corporation which, however, contained a condition that it should cease if the interest of the insured in the mortgaged property should pass from the insured "otherwise than by operation of law." The Birkbeck Building Society was ordered to be wound up, and the liquidator desired to sell the mortgage and the benefit of the policy, in order to wind up the estate. The Insurance Corporation claimed that he had no right to do this without their consent, which they declined to give. Neville, J., however, held that the words "unless by operation of law," in a condition of this kind enables a person to whom property passes by operation of law with an obligation to realize it, to assign the property, and he, therefore, held that the liquidator was competent to sell the property and assign the policy without the consent of the insurers.

VENDOR AND PURCHASER—CONDITION OF SALE NEGATIVING RIGHT TO COMPENSATION—CONVEYANCE—PLAN—FALSA DEMONSTRATIO—IMPLIED COVENANTS FOR TITLE — LIABILITY OF VENDOR — MEASURE OF DAMAGES.

Eastwood v. *Ashton* (1913) 2 Ch. 39. This was an action to recover damages for breach of an implied covenant for title—in the following circumstances. In 1911 the plaintiff became the purchaser of a property known as Bank Hey Farm, containing

84 ac. 3 r. 4 p. or thereabouts, subject to a condition that any incorrect statement in the particulars was not to annul the sale, nor was the purchaser to be allowed any compensation in respect thereof. The property was conveyed to the plaintiff according to a plan of the property which was indorsed on the deed. This plan shewed that there was included in the property purported to be conveyed a strip of land 100 feet long by 36 feet wide, which had originally been part of the farm, but as to which, to the vendor's knowledge, the adjoining proprietor had acquired a title by possession. The conveyance contained the usual implied covenants for title. Sargant, J., who tried the action, held that the inclusion of the strip in the plan could not be treated as falsa demonstratio, and that the strip was included in the parcels conveyed. He also came to the conclusion that the condition of sale above referred to could not prevent the purchaser from recovering damages under the covenants for title, for any defect of title to the property conveyed to which such covenants were applicable; and also, that the omission of the vendor to prevent the adjoining owners from acquiring a title by possession to the strip constituted a thing "omitted or knowingly suffered" by the vendor within the meaning of his covenant and that it was immaterial that the vendor was under no duty to prevent it. He also held that the proper measure of damages in such a case is the difference in value of the land purported to be conveyed and the land which actually passed by the conveyance.

MORTGAGE—FORECLOSURE PROCEEDINGS—RECEIVER — LICENSE BY MORTGAGEES TO THIRD PARTIES TO WORK PEAT ON MORTGAGED PREMISES.

Stamford Spalding Banking Co. v. *Keeble* (1913) 2 Ch. 96. This was an action for foreclosure in which a receiver had been appointed. The mortgaged property consisted of a large tract of land, principally valuable for the peat beds thereon. The plaintiffs applied, before judgment, for the sanction of the court to an exclusive license, which they proposed to grant for a term of years at a premium and royalties, to work the deposits of peat, but Sargant, J., held that the court had no jurisdiction to sanction the proposed license. He, therefore, dismissed the application, but, as he thought the question a fairly arguable one, without costs.

STAYING ACTION—FALSE IMPRISONMENT—DEFENDANT PROTECTED BY STATUTE—PERSON DETAINED AS LUNATIC—DISCRETION.

Shackleton v. *Swift* (1913) 2 K.B. 304. This was an action for false imprisonment, brought by the plaintiff against the defendant, a master of a workhouse, for having, as alleged, improperly detained her as an alleged lunatic. The plaintiff had been placed in the workhouse under an order of a relieving officer, made under a statute requiring him to receive and detain her for three days. During that period a justice visited and examined the plaintiff, but made no order regarding her; but the medical officer of the workhouse, before the expiration of the three days, gave a certificate in writing, under the Lunacy Act, for her detention for fourteen days from its date. The plaintiff was detained for six days from the date of the certificate, and was then discharged by order of the medical officer. The Lunacy Act contains a provision to the effect that a person who does anything in pursuance of the Act shall not be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction, or on any other ground, if such person acted in good faith and with reasonable care. The defendant applied to stay the proceedings, on the ground that the action was not maintainable in the absence of any allegation that the defendant had not acted in good faith and with reasonable care, and that no facts were alleged to shew that the defendant had not so acted. The Master made an order staying the action, but Rowlatt, J., thought the action ought to be tried, and reversed the order, but the Court of Appeal (Williams, and Kennedy, L.JJ.), considered that on the facts disclosed in the affidavits, there was no evidence that the defendant had acted otherwise than in good faith, and with reasonable care, even assuming that the detention of the plaintiff after the original three days was unauthorised, in the absence of an order of a justice. Kennedy, L.J., was of the opinion that the medical certificate was, under the Act, a sufficient authority for the plaintiff's detention, and Williams, L.J., although not pronouncing as to the legality of the certificate, was yet of the opinion that the defendant, after its receipt, would not have been justified in discharging the plaintiff. Although the conclusion arrived at may be correct, it nevertheless looks somewhat like trying a case on affidavits on an interlocutory application.

STREET CAR—BY-LAW REQUIRING PASSENGER TO LEAVE BY HINDERMOST END—CONSTRUCTION.

In *Monkman* v. *Stickney* (1913) 2 K.B. 377 the construction of a by-law was in question, which regulated the exit of passengers from street cars of a municipal corporation. The by-law in question required that passengers should leave by the hindermost, or conductor's end. Both ends of the car were identical in construction and form. The defendant, a passenger, on the arrival of the car at the terminus, alighted from the end which, while the car was in motion, was the driver's end, and was summoned for a breach of the by-law. On a case stated by the Magistrate, the Divisional Court (Ridley, Pickford, and Avory, JJ.), held that the accused ought to have been convicted.

LANDLORD AND TENANT—COVENANT BY LESSEE TO PAY "OUTGOINGS"—COVENANT BY LESSOR TO KEEP EXTERIOR OF PREMISES IN REPAIR—NOTICE BY SANITARY AUTHORITY TO RECONSTRUCT OUTSIDE DRAIN.

Howe v. *Botwood* (1913) 2 K.B. 387. This was an action by a lessor against a lessee, in the following circumstances: by the lease the lessee covenanted to pay to the lessor all "outgoings" which now are, or during the said term shall be charged on the premises or the landlord, in respect thereof; and the lessor on his part covenanted to keep the exterior of the premises in repair. The plaintiff was served with notice by the sanitary authority, under the Public Health Act, that a nuisance existed on the premises, arising from the defects in an outside drain, and requiring him to do certain work which involved the renewal and reconstruction of the drainage system outside the house, and an order of justices was made requiring him to do the work. The lessor accordingly did the work, and in the present action claimed to recover the cost thereof, so far as it exceeded mere repair. The County Court Judge dismissed the action, and on appeal to the Divisional Court (Channell, and Coleridge, JJ.) his decision was affirmed, the Court holding that the lessee's covenant to pay "outgoings" must be read as being subject to the performance by the lessor of his covenant to keep the exterior of the premises in repair; and that, as the work of renewal and reconstruction of the drains was necessary in order to enable the plaintiff to perform his covenant to repair, he was bound himself to bear the cost thereof, and could not recover it from the defendant.

PRACTICE—SPECIALLY INDORSED WRIT— REDUCTION OF AMOUNT CLAIMED BY PAYMENT AFTER WRIT— JUDGMENT IN DEFAULT OF APPEARANCE, FOR SUM IN EXCESS OF AMOUNT DUE—SETTING ASIDE JUDGMENT—AMENDMENT.

Muir v. *Jenks* (1913) 2 K.B. 412. In this case on 2nd May, 1912, the plaintiff issued a specially indorsed writ for £328 16s. 7d. On 8th May, 1912, £20 was paid to them in reduction of the claim. On 15th May, 1912, the plaintiff signed judgment in default of appearance, for £328 16s. 7d., the amount indorsed on the writ. The plaintiff having instituted bankruptcy proceedings, founded on the judgment, on 7th March, 1913, the defendant applied to set aside the judgment, on the ground that the writ had not been properly served upon the defendant, and at the hearing of the application, he took the objection that the judgment was in excess of the amount actually due. The Master dismissed the application, and Bucknill, J., confirmed his decision; but the Court of Appeal (Buckley, and Kennedy, L.JJ.), held that, where a plaintiff obtains a wrong judgment, it is his duty, and not that of the defendant, to get it put right, and, therefore, that the defendant was not in any way prejudiced by the delay which had taken place. And, as, on the application before the Master, the plaintiff had refused an offer to amend the judgment, because, in the bankruptcy proceedings, he had only claimed the amount actually due; the Court of Appeal held that the defendant was entitled to have the judgment set aside, with costs, which was accordingly done.

SHIP—BILL OF LADING—FREIGHT PAYABLE BEFORE DELIVERY—GOODS PLACED BY SHIPOWNER IN WAREHOUSE TO BE HELD FOR HIM—NO NOTICE GIVEN OF LIEN FOR FREIGHT—RIGHT OF CONSIGNEE TO DELIVERY ON DEPOSIT OF FREIGHT WITH WAREHOUSEMAN—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. C. 60), SS. 493-496.

Dennis v. *Cork S.S. Co.* (1913) 2 K.B. 393. In this case the plaintiffs were consignees of certain goods carried by the defendants' steamship from Antwerp to Southampton, under a bill of lading providing that the shipowner shall have a lien for freight, which was to be paid "at destination, before delivery," and that the goods should be taken from alongside by the consignee, as soon as the vessel was ready to discharge, and that otherwise they might be "landed, put into lighters, or stored by the steamer's

agent . . . at the expense of the consignee." The steamer arrived, but the consignee did not take delivery, or pay freight. The shipowners thereupon placed the goods in a warehouse, with written instructions not to deliver them to anyone without written instructions, accompanied by their release from freight. The endorsees of the bill of lading sent it to the warehouseman, with the amount due for freight, and asked delivery of the goods pursuant to s. 495 (2) of the Merchants Shipping Act, 1894; but delivery being refused, this action was brought. Under the Merchants Shipping Act, s. 496, where money is deposited with a warehouseman, he is to retain it 15 days, and in the meantime the consignee may give him notice as to whether he admits all or any part of it to be due to the shipowner, and if no such notice is given, he is to pay the amount deposited to the shipowner. The action was tried by Scrutton, J., who held that the goods had not been placed by the shipowners in the warehouse, under the provisions of ss. 493-496, of the Merchants Shipping Act, 1894, and that, therefore, the owners of the goods were not entitled to delivery upon depositing the freight; and he was of the opinion that the plaintiffs were attempting to alter their contract, which was to pay "before delivery," by substituting a payment, subject to a right to examine the goods, and to make claims for deductions, if any, which they were not entitled to do.

NEGLIGENCE—PROXIMATE CAUSE OF DAMAGE—MALICIOUS ACT OF THIRD PARTY—REASONABLE PRECAUTIONS—OVERFLOW OF WATER FROM LAVATORY.

Richards v. *Lothian* (1913) A.C. 263. This was an action by the tenant of premises against the owner to recover damages for a loss occasioned by the overflow of water from a lavatory situate in a floor over the plaintiff's premises. The damage occurred owing to the malicious act of some third person plugging up the waste pipe and turning on the water in a basin. The basin was properly constructed and the waste pipe was sufficient for all reasonable purposes. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Atkinson, and Moulton) held, reversing the High Court of Australia, that in the absence of any finding by the jury, that the defendant had instigated the act, or ought reasonably to have prevented it, the defendant was not liable; and secondly, that his having on his premises a proper and reasonable supply of water was an ordinary and proper use of his house, and although

he was bound to use all reasonable care, he was not responsible for damage not due to his own default, whether caused by inevitable accident, or the wrongful acts of third persons. *Fletcher* v. *Rylands,* L.R. 1 Ex. 265; L.R. 3 H.L. 330, was invoked by the plaintiff, but their Lordships were of the opinion that the principle of the case of *Nichols* v. *Marsland,* 2 Ex.D. 1, where it was held that where water escaped from the defendants' artificial lake owing to a sudden tempest, that the defendant was not liable for the consequent injury, applied to the present case, and that water escaping through the act of God, or the King's enemies, or the malicious acts of a stranger, could not render the owner of the premises from which the water came liable to third persons. Moreover, their Lordships point out that it is not every use to which land is put that brings the principle of *Rylands* v. *Fletcher* into operation, but that it must be some special use, bringing with it increased danger to others, and that the maintenance of an ordinary water supply for a basin could not be regarded as such a special use.

BUILDING CONTRACT—ARBITRATION CLAUSE—ARCHITECT TO ACT AS ARBITRATOR—COLLUSION—DISQUALIFICATION—PAYMENTS TO BE MADE ON CERTIFICATE OF ARCHITECT—IMPROPER DELAY IN GIVING CERTIFICATE—CONDITION PRECEDENT—ACTION BEFORE CERTIFICATE.

Hickman v. *Roberts* (1913) A.C. 229. This was an action to recover balance due under a building contract. The contract provided that disputes were to be referred to the architect employed by the owners, and that payments were to be made on his certificate. Acting under a mistaken idea of his duty, the architect allowed his judgment to be improperly influenced by the owners and improperly delayed issuing his final certificate in accordance with their instructions. The action was commenced before the issue of the certificate, and two questions arose: first, Sol. J. 580, which is also reported in a note to this case, was but the Court of Appeal (Farwell and Kennedy, L.JJ.) were of the opinion that that case did not lay down any such general rule, but rested on particular circumstances, which did not exist in the present case, and the proposed interrogatory was held to be inadmissible as being a purely fishing interrogatory unsupported by any evidence.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT OF CANADA.

Audette, J.] IN RE LAPOINTE AND THE KING. [Feb. 4.

Government railway—Negligence—Fatal injury to workman—Brakesmen—Defective coupling on car—Knowledge of defect—Acceptance of risk—Unskilled workman—Standard of prudence—Liability.

T. was employed on the Intercolonial Railway as a brakesman. At the time of the accident whereby he lost his life he was one of the crew on a shunter-train working between different stations along the line of the Intercolonial Railway in the province of Quebec. The coupling device of one of the cars in this train was defective in that the chain connecting the pin and the lever was broken and disconnected, so that the device would not act automatically. It is the practice of brakesmen to uncouple cars when the train is in motion by means of this automatic device. There are no rules or regulations of the road forbidding the work being done in this way. It was shewn by the evidence that the train hands knew that the coupling on this particular car was defective. The deceased was not a permanent employee and had not acquired that skill in coupling and uncoupling cars that more experienced brakesmen have. His attention was called by one of his fellow-workmen to the fact that the coupling was defective but notwithstanding this he undertook to uncouple the car while the train was in motion. Finding that he could not accomplish this with the defective device he went between the cars and attempted to do the work of uncoupling with his hands. He fell between the cars and the wheels passed over him, injuring him fatally.

Held, that T. had accepted the risk of making the coupling under the circumstances; and that the Crown was not liable.

(2) If an inexperienced workman knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

Stein, and *Lapointe,* for suppliants. *Cimon,* for respondents.

Audette, J.] THE KING *v.* CRUMB. [Feb. 17.

Public land—Lease—Information to cancel—Improvidence—Knowledge of Crown officials of litigation respecting property in question.

In proceedings on behalf of the Crown to annul and cancel a certain lease of ordnance and admiralty lands, it appeared that, although there was information on their files respecting litigation at one time pending in the civil courts between the defendant's predecessor in title and other parties with respect to the property demised, the officials of the Department of the Interior issued the lease in question. It appeared, however, that at the time the lease was issued the department was not aware of a judgment in one of the civil courts which decided adversely to the rights of the defendant's predecessor in title.

Held, 1. That under all the circumstances, the lease was issued through inadvertence and improvidently and that the same should be cancelled.

2. The officers of the Crown should have satisfied themselves before issuing the lease that the litigation, of which there was knowledge in the department, had first been disposed of in favour of the applicant.

Swayze, for plaintiff. *Gorman,* for defendant.

Audette, J.] THE KING *v.* FALARDEAU. [March 10.

Expropriation—Water lots—Prospective value—Remoteness at date of expropriation.

The Crown had expropriated for the purposes of the National Transcontinental Railway a discarded lumber cove near the city of Quebec, with all the buildings and wharves erected thereon. In the days of wooden ships, and when the lumber trade was flourishing at its best in Quebec, the property in question was worth a great deal. After that time the property had very much depreciated in value, but the defendants relied upon the prospective capabilities of the property for docking purposes when steamers in the St. Lawrence trade became too large to proceed up the river to the port of Montreal.

Held, that such a rise of the property was too contingent and remote at the date of expropriation to be regarded as an element in the market value of the property.

Flynn, K.C., and *Chapleau,* for plaintiff. *Baillargeon,* for defendants.

Audette, J.] [March 17.

CANADIAN RUBBER COMPANY *v.* COLUMBUS RUBBER COMPANY.

Trade-mark—Infringement—Similarity of mark—Injunction—Damages.

Plaintiff company was the duly registered owner of a general trade-mark consisting of an effigy of Jacques Cartier surrounded by the words "The Canadian Rubber Company of Montreal, Limited." The plaintiff, and its predecessor in title, had been for years large manufacturers of rubber footwear to which this mark was applied. It was established that so well-known was the mark in the trade that customers of merchants handling the plaintiff's goods in the province of Quebec would ask for them by the name of the "Jacques Cartier," the "Canadian" or the "Sailor." In June, 1912, the defendant company proceeded to manufacture and sell a certain class of rubber footwear with the effigy of a sailor closely resembling that of Jacques Cartier in the plaintiff's trade-mark, surrounded with the words, "Columbus Rubber Company of Montreal, Limited" in a scroll chiefly differing from the one used by the plaintiff in that it was rectangular in form while that of the plaintiff was round. Defendant's mark was not registered.

Held, that there was such a similarity between the defendant's mark and that of the plaintiff as to be calculated to deceive the public into purchasing the defendant's goods for those of the plaintiff, and that the defendant should be enjoined from placing on the market and selling rubber footwear and goods bearing the mark as above described.

2. That there should be a reference to the Registrar to ascertain what damages were sustained by the plaintiff by reason of the defendant's interference with its business.

T. C. Casgrain, K.C., and *Stairs,* for plaintiff. *A. Geoffrion,* K.C., for defendant.

Audette, J.] [April 2.

IN RE DAVID HARRISON AND THE KING.

Negligence—Public work—Ice on approach—Injury to the person—Liability.

Suppliant sustained bodily injury by falling whilst walking over the footpath on one of the approaches to the Seigneur street

bridge, over the Lachine Canal, in the city of Montreal. The place where he fell was under the care and control of the Dominion Government; and the superintendent of the canal and his assistants were charged with the duty of maintaining the footpath in question in good order. The accident happened at 11.30 o'clock of the night of the 6th of January, 1912, which date was a holiday. The footpath was in a slippery condition owing to ice, the weather at the time being very changeable. It was shewn by a witness, whose specific employment it was to spread ashes over this footpath for the purpose of preventing accidents to pedestrians, that at four o'clock on the afternoon of the day before the accident he had spread ashes on the spot where the suppliant fell; and that, although it was a holiday, he visited the footpath at two o'clock on the afternoon of the accident and found that the ashes were still there and that no more were required for safety.

Held, upon the facts, that no negligence was attributable to the superintendent of the canal or his assistants, and that the suppliant was not entitled to recover.

Curran, for suppliant. *Hackett,* for respondent.

Audette, J.] THE KING *v.* L'HEUREUX. [April 5.

Constitutional law—Seizure of liquor in possession of Dominion —Limitation to authority of provincial statute—Illegality— Notice of action—Prescription.

Held, 1. The provisions of the Quebec Liquor License Act (R.S. Quebec (1909), sec. 14, pt. 2, ch. 5, title IV.) are not binding upon the Crown in right of the Dominion of Canada. Hence, when a person enters a building of the Intercolonial Railway of Canada and seizes and carries away therefrom certain liquors constituting freight consigned to third persons he cannot justify such seizure and conversion by invoking the authority of the said Act.

2. Want of notice under art. 88 C.C.P. (P.Q.), in an action for damages against an officer, if not specially pleaded by the defendant may be raised at the trial, and evidence then adduced shewing that the requisite notice was in fact given.

3. Prescription is not a matter coming within arts. 2267, and 2188 C.C.P. (P-Q), and must be raised by the defence filed.

Newcombe, K.C., for plaintiff. *Marchand,* for defendant.

Audette, J.] [April 10.

FELT GAS COMPRESSING COMPANY *v.* FELT, WALKER, ET AL.

Patents for invention—Jurisdiction of Exchequer Court in cases not falling within the statutes—Rights of parties defendant upon contract—Validity of assignments.

The Exchequer Court has no jurisdiction at common law in actions respecting patents or invention, and where any relief is sought in respect of such matters the jurisdiction of the Court to grant the same must be found in some statute.

The Court cannot entertain proceedings to obtain a declaration of the respective rights of parties inter se arising under assignments of a patent of invention; nor for a declaration that such assignments are invalid; and that the registration thereof should be vacated.

M. G. Powell and *Caldwell,* for motion for judgment on objections in law. *Lewis,* K.C., *contra.*

Book Reviews.

Supreme Court Act (1906) *Practice and Rules.* By EDWARD ROBERT CAMERON, K.C., Registrar of the Supreme Court. 2nd edition. Toronto: Arthur Poole & Co. 1913.

This is a volume of over one thousand pages, and is a timely and welcome addition to the libraries of practising lawyers in this Dominion. It contains all the material to be found in the first edition with all the reported decisions of the court since then, including a large number of judgments not elsewhere reported. Several new features also appear which add to the value of the book.

The construction adopted by the compiler is to give the Act and rules verbatim, each section being followed by a digest of all the authorities bearing thereon or in relation thereto, under appropriate general headings.

Whilst this scheme gives the reader the judicial interpretation of the various sections of the Act and rules, it cannot be said that it produces a book of practice, in the ordinary sense of that expression. The latter mode of dealing with the subject might perhaps be preferred by some practitioners, but it is not unreasonable to suppose that Mr. Cameron may be right; at least his long experience in the position he occupies, and his

great familiarity with the subject, warrants the belief that the plan he has adopted is the one which meets the views of the majority of those who have occasion to use a work of this kind.

It will readily be seen, however, that this mode of dealing with the subject calls for an exhaustive index for the purpose of collecting under appropriate headings the great mass of information which the book contains, and which could not otherwise be grouped together. This requirement naturally leads to a closer examination of the index. In making an index it has to be remembered that men's minds do not all run in the same groove; one would look for the same information under one head and another under another head—quot homines tot sententiæ. Good index makers are few and far between, and are much rarer than might generally be supposed. There are many good lawyers who are quite incapable of doing that sort of work. This necessity of an exhaustive index amplifying the headings was not perhaps sufficiently realized by the person who prepared the one which concludes this excellent compilation.

The author gives a number of useful forms in appendix B. Appendix C gives the rules and forms in connection with appeals to the Judicial Committee of the Privy Council. Appendix D deals with exchequer appeals under the Exchequer Court Act. Other appendices give the Dominion Controverted Elections Act, appeals under the Railway Act; appeals under the Winding up Act; Criminal appeals under certain sections of the Criminal Code, followed by a copy of the Supreme Court Act as it appears in R.S.C. c. 139.

The Chief Justice of the Supreme Court speaks of "Mr. Cameron's very useful book on the practice of the Court." We concur with his lordship in the opinion thus tersely expressed.

A Short Treatise on the Law of Bills of Exchange, Cheques, Promissory Notes and Negotiable Instruments Generally. By BERTRAM JACOBS, LL.D. Barrister-at-Law. London: Sweet & Maxwell, 3 Chancery Lane. 1913.

This isa handy compendium of 266 pages on the much written about law of Bills and Notes. The author in his preface states that the object of this short treatise is to provide a clear exposition of the main principles underlying the law of negotiable instruments and of the rules illustrative of those principles. An excellent work for beginners and business men.

Federal Incorporation—the constitutional question involved. By ROWLAND CARLISLE HEISLER. Boston Book Co. 1913.

This is a handy compendium of 266 pages on the much writ- Pennsylvania Law School. The object of the university in connection therewith is to promote the scientific study of legal problems, historical and practical, and to assist in the improvement of the law. Mr. Heisler is a graduate of the Law School and a member of the Philadelphia Bar, and one of the Gowen Memorial Fellows of that school.

We commend this book to the attention of that class of the profession who are interested in such matters. It is a pity there are not a few more of them than there are.

Bench and Bar

We are asked to announce that Mr. W. E. Jopp, Barrister, etc., Swift Current, has taken Mr. R. Maulson into partnership, and the business of the firm will hereafter be carried on under the firm name of Jopp & Maulson.

Frederick John Strange Martin, of the City of Sault Ste. Marie, in the District of Algoma, Barrister-at-law, has been appointed District Crown Attorney and Clerk of the Peace in and for the District of Algoma, vice Moses McFadden, Esquire, resigned.

Flotsam and Jetsam

ARBITRATION FEES—SCOTCH LAW:—The rule recognized by the writers of the old legal text-books was that an arbiter was not entitled to remuneration unless he expressly stipulated for it, the theory being that an arbiter was one who undertook a purely friendly office for the settlement of differences between persons who did not desire to litigate. *MacIntyre Bros.* v. *Smith*, [1913] 50 S.L.R. 261, has led to a reconsideration of that principle. One of the parties to an arbitration refused to pay his share of the arbiter's fee on the ground that, as no remuneration had been stipulated for, the common law rule applied that the arbiter in such a case must be presumed to act

gratuitously. It was held, that that rule is not applicable to the modern conditions of business, and that a professional man can no longer be presumed to give professional services gratuitously.—*Law Magazine.*

TURF CUTTING—IRISH CASE:—The case of *Cronin* v. *O'Connor*, [1913] 2 Ir. R. 119, presents a curious state of facts, apparently uncovered by any previous direct authority. The owner of lands had a right of cutting and saving turf on a plot of an adjoining bog. This plot was not fenced or divided off from the rest of the bog. The man who owned the soil and freehold of the bog depastured cattle upon it; they did harm to the turf which was cut and spread upon the plot in question; the bog owner had made no provision for preventing such damage by his cattle to the turf. The person entitled to the right of turbary sued the bog owner for trespass, and it was held that the action would lie. The wrong consisted in an unreasonable use of one's own property, having regard to the dominant tenant's profit à prendre. There are, said the court, two rights in the one subject-matter: the natural right of the owner of the bog to the soil and freehold, and the incorporeal right in the nature of a profit vested in the plaintiff, in respect of the same bog; which is to give way? Evidently, if a profit à prendre is founded on an implied grant, and if a man may not derogate from his own grant, the general rights of the servient owner must give way so far as is necessary for the due enjoyment of the particular right of the dominant owner.—*Law Magazine.*

JOINT TORT FEASORS—DIFFERENT DAMAGES.—An interesting point was decided in a recent English case of *Greenlands Limited* v. *Wilmshurst* on which the court was unanimous. A practice had arisen of allowing juries to give different damages against different defendants when sued in one action as joint tort feasors, and the Court of Appeal has now declared this to be unjustifiable. Thus, where there is a joint publication of one libel, there can be only one joint judgment against all defendants, for in the case of a joint tort each tort feasor is liable for the whole injury sustained. The effect of this where privilege is set up is well illustrated by a case recently tried by Mr. Justice Bankes of *Smith* v. *Streatfield*. In that case privilege was admitted; but the jury found express malice against one defendant but not against the other, and the learned judge then entered judgment against both defendants.

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THE AMERICAN BAR ASSOCIATION.

The meeting of this important Association, held last month in the city of Montreal, was, perhaps, the most notable one in its history.

In the first place, it was held outside the borders of the United States, a compliment being paid to the Dominion of Canada of holding it in this country. Mr. Frank B. Kellogg, of St. Paul, Minnesota, the President of the Association, referred to this in the following words: "This is the first meeting of the American Bar Association outside of the United States. Though we meet in a foreign country, we do so among a people allied to us by every tie that binds nations in a common brotherhood. We are of the same race, speaking the same language, governed by the same general principles of law, inspired by the same traditions, working out as separate nations the same great destiny. I hope that the peace which has so long existed between these peoples may be further cemented, and mutual and friendly intercourse continue to increase. On behalf of the American Bar Association, I welcome this opportunity to extend to the officials and lawyers of the Dominion of Canada our sincere thanks for the great assistance they have rendered towards making this a memorable meeting of our Association." On behalf of the Bar of the Dominion we recognize and appreciate the compliment thus paid to us.

In the next place this gathering was not merely of members of the Bar, but also of judges, who met in connection with the Bar Association for a conference of their own. In speaking of this, Hon. Thomas W. Shelton, of Virginia, who presided at the Conference of Judges, said: "It is the first Conference of Judges ever held in the history of the United States. The object is to bring about uniformity in judicial procedure amongst the States through fixed interstate judicial relations just as there is now fixed interstate commercial relations."

This Conference of Judges was composed of the forty-eight Chief Justices of the several states, and the nine presiding Circuit Judges of the United States Circuit Courts of Appeals, who were all present with the exception of three or four absentees. It was admittedly one of the most unique and distinguished audiences ever assembled in connection with the legal profession, and the prediction was made that it would mean to interstate judicial relations what the famous Mt. Vernon Conference, held in 1785, between Virginia and Maryland, meant to interstate commerce relations. The speaker expressed the "fervent hope that the Montreal Conference would mark itself in history as the beginning of fixed interstate judicial relations, made so by unselfish patriotism and not by fundamental law." All this gives to us in this Dominion food for thought, which may well mean something for our benefit in years to come.

In the third place, the meeting of the American Bar Association, and the Conference of Judges in connection therewith, was of importance by reason of the number of eminent men who were present and took part in the proceedings. In addition to those who would naturally be there on such an occasion, there were notable representatives of the legal fraternity, both of Great Britain and of France, as well as the Dominion of Canada. Prominent among these was the Lord High Chancellor of Great Britain, Viscount Haldane. The occupant of this high office is said to rank as the second non-royal subject in the Kingdom—is a member of the Privy Council by prescription—the Speaker of the House of Lords—the Keeper of the King's Conscience—the Custodian of the Great Seal of the United Kingdom— the head of the judicial administration of England, responsible for the appointment of the judges of the High Court (with the exception of the Chief Justice, who is appointed by the Prime Minister), and who has also the appointing of County Court Judges—the President of the High Court of Justice and of the Chancery Division of the High Court, and the presiding officer of the Court of Appeals, besides holding other honours and responsibilities for various other duties.

France was well represented by Maitre Labori, Batonnier

de l'ordre des Advocats a la Cour de Paris. M. Labori is of course a man of world-wide fame, a great civil lawyer, and, above all, a patriotic citizen with a high sense of duty. The Dreyfus case, the Zola case, and the trial of Rennes, and other *causes celebres*, brought him prominently before the public some years ago.

The Lord Chancellor gave the address which seemed to attract the greatest interest; at least we have a right to gather that from the remarks made by Mr. Hampton L. Carson, who introduced resolutions of appreciation and acknowledgment thereof, which he did in the following graceful terms:—

"The dignity and authority of the Woolsack and the glories of Westminster Hall are as dear to us as to the benchers of Lincoln's and Gray's Inns and the Inner and Middle Temple. The fame and the labours of Nottingham, Hardwicke, and Eldon are as much a part of our professional renown and professional treasures as those of Marshall, Story and Kent. Inspired by the same traditions, enjoying the same heritage, administering the same principles, and drawing our knowledge from the same sources, we claim the common law as our birthright, and are partakers of the destiny of the Anglo-Saxon to rule an ever expanding empire of civilization and humanity by the light of a liberal jurisprudence. We recognize the same fealty to duty; we are conscious of the same holy mission; we are upheld by the same pride of achievement; we kneel at the same altar and chant the same anthems of liberty. We place beside Magna Charta and the Bill of Rights the Constitution of the United States, and claim our share in building up the bulwarks of popular government."

As our readers will be glad to have Lord Haldane's address *in extenso*, it will be found in these pages at the close of this article.

It would be impossible within our limited space to give all the various papers and debates thereon which formed the material presented on this remarkable occasion. We can only refer to a few.

Mr. Taft, Ex-President of the United States, read a paper

dealing with the selection and tenure of judges, in which, after a full discussion of the mode of appointment in the United States and Canada, he sets forth the defects of the elective system and the advantages of the appointment of judges by the Government of the day on a life tenure, concluding as follows:—

"I have thus taxed your patience with the reasons that convince me that appointment and a life tenure are essential to a satisfactory judicial system. They may seem trite and obvious, but I have thought, in the present disposition to question every principle of popular government that has prevailed for more than a century, that it might be well, at the risk of being commonplace, to review them. In the present attitude of many of the electorate toward the courts it is perhaps hopeless to expect the states, in which judges are elected for short terms, to return to the appointment of judges for life. But it is not in vain to urge its advantages. The federal judges are still appointed for life, and it will be a sad day for our country if a change be made either in their mode of selection or the character of their tenure. These are what enable the federal courts to secure the liberty of the individual and to preserve just popular judgment."

The address of the President, Mr. Kellogg, of Minnesota, took up the subject of Treaty Making Power, which he dealt with in an exhaustive and masterly manner.

Another matter that was discussed was the struggle which has been going on for some time in the United States for the Simplification of Legal Procedure. One branch of it was dealt with by Hon. William C. Hook, Judge of the United States Circuit Court of Appeals, Eighth Circuit. Another branch took up Legal Procedure and Social Unrest, receiving the attention of Hon. N. Charles Burke, Judge of the Court of Appeals of Maryland. Another branch was dealt with by Hon. William A. Blount, of Pensacola, Florida.

The subject of legal education in various aspects was discussed by Mr. Edson R. Sutherland, of the University of Michigan, who spoke on teaching practice, and by Mr. Clarence A. Lightner, of Michigan, who inquired into and gave his views of the moral character of applicants for admission to the Bar. Mr. Walter

G. Smith, of Philadelphia, President of the Section of Legal Education, also read a paper on the same subject.

The annual address of the Director of the Bureau of Comparative Law was given by Mr. Simeon E. Baldwin, Governor of Connecticut.

Before the business of the Association was commenced, an address of welcome to the members of the Association was delivered by Hon. R. L. Borden, P.C., K.C. Premier of Canada.

In the afternoon Lord Haldane delivered his address at the Princess Theatre. The theatre was packed to the roof and a great many could not obtain admission. The speaker was introduced by Chief Justice White of the Supreme Court of the United States. On the platform were Hon. Mr. Borden, Prime Minister; Hon. Mr. Doherty, Minister of Justice; Hon. J. J. Foy, Attorney-General for Ontario; Hon. George E. Foster; M. H. Ludwig, President of the Ontario Bar Association, and other Canadians.

In the evening the Minister of Justice gave a dinner at the Ritz Carlton in honour of the Lord Chancellor, to which about two hundred distinguished guests attending the meeting were invited. This dinner was probably one of the most brilliant affairs that has ever taken place in Montreal. After the dinner a reception was held in the Royal Art Gallery to Lord Haldane and his sister, when about twenty-five hundred people were presented. Hon. Mr. Borden and Mrs. Borden and the Minister of Justice did the honours on the occasion.

On Wednesday night (Sept. 3rd) the Annual Dinner of the Association took place at the Windsor, which was attended by more than one thousand persons. Hon. Joseph H. Choate presided. The principal speakers were the Chairman, Hon. Mr. Doherty, Minister of Justice; Mr. Taft, Ex-President of the United States, and Maitre Labori.

The officers of the Ontario Bar Association took an active part in bringing the meeting of the American Bar Association to the attention of our profession and in making arrangements in connection therewith. The Ontario Association was represented by the President, M. H. Ludwig, K.C., the three Vice-

Presidents, F. M. Field, K.C., W. J. McWhinney, K.C., and Geo. C. Campbell, with about forty delegates from various parts of the Province.

We conclude by giving our readers, as promised, Lord Haldane's address *in extenso*, which he designated as a paper on "Higher Nationality, A Study of Law and Ethics." It reads as follows:—

"IT is with genuine pleasure that I find myself among my fellow-lawyers of the New World. But my satisfaction is tempered by a sense of embarrassment. There is a multitude of topics on which it would be most natural that I should seek to touch. If, however, I am to use to any purpose the opportunity which you have accorded me, I must exclude all but one or two of them. For in an hour like this, as in most other times of endeavour, he who would accomplish anything must limit himself. What I have to say will therefore be confined to the suggestion of little more than a single thought, and to its development and illustration with materials that lie to hand. I wish to lay before you a result at which I have arrived after reflection, and to submit it for your consideration with such capacity as I possess.

For the occasion is as rare as it is important. Around me I see assembled some of the most distinguished figures in the public life of this continent; men who throughout their careers have combined law with statesmanship, and who have exercised a potent influence in the fashioning of opinion and of policy. The law is indeed a calling notable for the individualities it has produced. Their production has counted for much in the past of the three nations that are represented at this meeting, and it means much for them to-day.

What one who finds himself face to face with this assemblage naturally thinks of is the future of these three nations; a future that may depend largely on the influence of men with opportunities such as are ours. The United States and Canada and Great Britain together form a group which is unique; unique because of its common inheritance in traditions, in surroundings, and in ideals. And nowhere is the character of this common nheritance more apparent than in the region of jurisprudence.

The lawyers of the three countries think for the most part alike. At no period has political divergence prevented this fact from being strikingly apparent. Where the letter of their law is different the spirit is yet the same, and it has been so always. As I speak of the historical tradition of our great calling, and of what appears likely to be its record in days to come, it seems to me that we who are here gathered may well proclaim, in the words of the Spartans, "We are what you were; we shall be what you are."

It is this identity of spirit, largely due to a past which the lawyers of the group have inherited jointly, that not only forms a bond of union, but furnishes them with an influence that can hardly be reproduced in other nations. I take my stand on facts which are beyond controversy, and seek to look ahead. I ask you to consider with me whether we, who have in days gone by moulded their laws, are not called on to try in days that lie in front to mould opinion in yet another form, and so encourage the nations of this group to develop and recognize a reliable character in the obligations they assume towards each other. For it may be that there are relations possible within such a group of nations as is ours that are not possible for nations more isolated from each other and lacking in our identity of history and spirit. Canada and Great Britain on the one hand and the United States on the other, with their common language, their common interests, and their common ends, form something resembling a single society. If there be such a society it may develop within itself a foundation for international faith of a kind that is new in the history of the world. Without interfering with the freedom of action of these great countries, or the independence of their constitutions, it may be possible to establish a true unison between sovereign states. This unison will doubtless, if it ever comes into complete being, have its witnesses in treaties and written agreements. But such documents can never of themselves constitute it. Its substance, if it is to be realized, must be sought for deeper down in an intimate social life. I have never been without hope that the future development of the world may bring all the nations that compose it nearer together,

so that they will progressively cease to desire to hold each other at arm's length. But such an approximation can only come about very gradually, if I read the signs of the times aright. It seems to me to be far less likely of definite realization than in the case of a group united by ties such as those of which I have spoken.

Well, the growth of such a future is at least conceivable. The substance of some of the things I am going to say about its conception, and about the way by which that conception may become real, is as old as Plato. Yet the principles and facts to which I shall have to refer appear to me to be often overlooked by those to whom they might well appear obvious. Perhaps the reason is the deadening effect of that conventional atmosphere out of which few men in public life succeed in completely escaping. We can best assist in the freshening of that atmosphere by omitting no opportunity of trying to think rightly, and thereby to contribute to the fashioning of a more hopeful and resolute kind of public opinion. For, as someone has said, "*L'opinion générale dirige l'autorité, quels qu'en soient les dépositoires.*"

The chance of laying before such an audience as this what was in my mind made the invitation which came from the Bar Association and from the heads of our great profession, both in Canada and in the United States, a highly attractive one. But before I could accept it I had to obtain the permission of my Sovereign; for, as you know, the Lord Chancellor is also *Custos Sigilli*, the Keeper of that Great Seal under which alone supreme executive acts of the British Crown can be done. It is an instrument he must neither quit without special authority, nor carry out of the realm. The head of a predecessor of mine, Cardinal Wolsey, was in peril because he was so daring as to take the Great Seal across the water to Calais, when he ought instead to have asked his Sovereign to put it into commission.

Well, the *Clavis Regni* was on the present occasion put safely into commission before I left, and I am privileged to be here with a comfortable constitutional conscience. But the King has done more than graciously approve of my leaving British shores.

I am the bearer to you of a message from him which I will now read:—

"I have given my Lord Chancellor permission to cross the seas, so that he may address the meeting at Montreal. I have asked him to convey from me to that great meeting of the lawyers of the United States and of Canada my best wishes for its success. I entertain the hope that the deliberations of the distinguished men of both countries who are to assemble at Montreal may add yet further to the esteem and goodwill which the people of the United States and of Canada and the United Kingdom have for each other."

The King's message forms a text for what I have to say, and, having conveyed that message to you, I propose in the first place to turn to the reasons which make me think that the class to which you and I belong has a peculiar and extensive responsibility as regards the future relations of the three countries. But these reasons turn on the position which courts of law hold in Anglo-Saxon constitutions, and before I enter on them I must recall to you the character of the tradition that tends to fashion a common mind in you and me as members of a profession that has exercised a profound influence on Anglo-Saxon society. It is not difficult in an assemblage of lawyers such as we are to realize the process by which our customary habits of thought have come into being and bind us together. The spirit of the jurisprudence which is ours, of the system which we apply to the regulation of human affairs in Canada, in the United States, and in Great Britain alike, is different from that which obtains in other countries. It is its very peculiarity that lends to it its potency, and it is worth while to make explicit what the spirit of our law really means for us.

I read the other day the reflections of a foreign thinker on what seemed to him the barbarism of the entire system of English jurisprudence, in its essence judge-made and not based on the scientific foundation of a code. I do not wonder at such reflections. There is a gulf fixed between the method of a code and such procedure as that of Chief Justice Holt in *Coggs* v. *Bernard*, of Chief Justice Pratt in *Armory* v. *Delmairie*, and of Lord Mans-

field when he defined the count for money had and received. A stranger to the spirit of the law as it was evolved through centuries in England will always find its history a curious one. Looking first at the early English common law its most striking feature is the enormous extent to which its founders concerned themselves with remedies before settling the substantive rules for breach of which the remedies were required. Nowhere else, unless perhaps in the law of ancient Rome, do we see such a spectacle of legal writs making legal rights. Of the system of the common law there is a saying of Mr. Justice Wendell Holmes which is profoundly true: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." As the distinguished writer whom I have quoted tells us, we cannot, without the closest application of the historical method, comprehend the genesis and evolution of the English common law. Its paradox is that in its beginnings the forms of action came before the substance. It is in the history of English remedies that we have to study the growth of rights. I recall a notable sentence in one of Sir Henry Maine's books. "So great," he declares, "is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." I will add to his observation this: That all our reforms notwithstanding, the dead hands of the old forms of action still rest firmly upon us. In logic the substantive conceptions ought of course to have preceded these forms. But the historical sequence has been different, for reasons with which every competent student of early English history is familiar. The phenomenon is no uncommon one. The time spirit and the spirit of logical form do not always, in a world where the contingent is ever obtruding itself, travel hand in hand.

The germs of substantive law were indeed present as potential forces from the beginning, but they did not grow into life until later on. And therefore forms of action have thrust themselves forward with undue prominence. That is why the understanding of our law is, even for the practitioner of to-day, inseparable from knowledge of its history.

As with the common law, so it is with equity. To know the principles of equity is to know the history of the courts in which it has been administered, and especially the history of the office which at present I chance myself to hold. Between law and equity there is no other true line of demarcation. The King was the fountain of justice. But to get justice at his hands it was necessary first of all to obtain the King's writ. As Bracton declared, "*non potest quis sine brevi agere.*" But the King could not personally look after the department where such writs were to be obtained. At the head of this, his chancery, he therefore placed a Chancellor, usually a Bishop, but sometimes an Archbishop, and even a Cardinal, for in those days the Church had a grip which to a Lord Chancellor of the twentieth century is unfamiliar. At first the holder of the office was not a judge. But he was keeper of the King's conscience, and his business was to see that the King's subjects had remedies when he considered that they had suffered wrongs. Consequently he began to invent new writs, and finally to develop remedies which were not confined by the rigid precedents of the common law. Thus he soon became a judge. When he found that he could not grant a common law writ he took to summoning people before him and to searching their consciences. He inquired, for instance, as to trusts which they were said to have undertaken, and as the result of his inquiries rights and obligations unknown to the common law were born in his court of conscience. You see at a glance how susceptible such a practice was of development into a complete system of equity. You would expect, moreover, to find that the ecclesiastical atmosphere in which my official predecessors lived would influence the forms in which they moulded their special system of jurisprudence. This did indeed happen, but even in those days the atmosphere was not merely ecclesias-

tical. For the Lord High Chancellor in the household of an early English monarch was the King's domestic chaplain, and as, unlike his fellow-servants in the household, the Lord High Steward and the Lord Great Chamberlain, he always possessed the by no means common advantage of being able to read and write, he acted as the King's political secretary. He used, it seems, in early days to live in the palace, and he had a regular daily allowance. From one of the records it appears that his wages were five shillings, a simnel cake, two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle, and forty small pieces of candle. In the time of Henry II. the modern treasury spirit appears to have begun to walk abroad, for in the records the allowance of five shillings appears as if subjected to a reduction. If he dined away from the palace, *si extra domum comederit*, and was thereby forced to provide extras, then indeed he got his five shillings. But if he dined at home, *intra domum*, he was not allowed more than three shillings and sixpence. The advantage of his position was, however, that, living in the palace, he was always at the King's ear. He kept the Great Seal through which all great acts of state were manifested. Indeed it was the custody of the Great Seal that made him Chancellor. Even to-day this is the constitutional usage. When I myself was made Lord Chancellor the appointment was effected, not by letters patent, nor by writing under the sign manual, nor even by words spoken, but by the Sovereign making a simple delivery of the Great Seal into my hands while I knelt before him at Buckingham Palace in the presence of the Privy Council.

The reign of Charles I. saw the last of the ecclesiastical Chancellors. The slight sketch of the earlier period which I have drawn shews that in these times there might well have developed a great divergence of equity from the common law, under the influence of the canon and Roman laws to which ecclesiastical chancellors would naturally turn. In the old courts of equity it was natural that a different atmosphere from that of the common law courts should be breathed. But with the gradual drawing together of the courts of law and equity under law

chancellors the difference of atmosphere disappears, and we see the two systems becoming fused into one.

The moral of the whole story is the hopelessness of attempting to study Anglo-Saxon jurisprudence apart from the history of its growth and of the characters of the judges who created it. It is by no accident that among Anglo-Saxon lawyers the law does not assume the form of codes, but is largely judge-made. We have statutory codes for portions of the field which we have to cover. But these statutory codes come, not at the beginning, but at the end. For the most part the law has already been made by those who practise it before the codes embody it. Such codes with us arrive only with the close of the day, after its heat and burden have been borne, and when the journey is already near its end.

I have spoken of a spirit and of traditions which have been apparent in English law. But they have made their influence felt elsewhere. My judicial colleagues in the Province of Quebec administer a system which is partly embodied in a great modern code, and partly depends on old French law of the period of Louis XIV. They apply, moreover, a good deal of the public and commercial law of England. The relation of the code to these systems has given rise to some controversies. What I have gathered, however, when sitting in the Judicial Committee of the Privy Council, is that a spirit not very different from that of the English lawyers has prevailed in Quebec. The influence of the judges in moulding the law, and of legal opinion in fashioning the shape which it should take, seem to me to have been hardly less apparent in Quebec than elsewhere in Canada. Indeed, the several systems of our group of nations, however these systems have originated, everywhere shew a similar spirit, and disclose the power of our lawyers in creating and developing the law as well as in changing it; a power which has been more exercised outside the legislature than within it. It is surely because the lawyers of the New World have an influence so potent and so easily wielded that they have been able to use it copiously in a wider field of public affairs than that of mere jurisprudence. It is very striking to the observer to see how many of the names of those

who have controlled the currents of public opinion in the United States and Canada alike have been the names of famous lawyers. I think this has been so partly because the tradition and spirit of the law were always what I have described and different from that on the Continent of Europe. But it has also been so because, in consequence of that tradition and spirit, the vocation of the lawyers has not, as on the Continent of Europe, been that of a segregated profession of interpreters; but a vocation which has placed him at the very heart of affairs. In the United Kingdom this has happened in the same fashion, yet hardly to so great an extent, because there has been competition of other and powerful classes whose tradition has been to devote their lives to a parliamentary career. But in the case of all three nations it is profoundly true that, as was said by the present President of the United States in 1910, in an address delivered to this very Association, "the country must find lawyers,of the right sort and the old spirit to advise it, or it must stumble through a very chaos of blind experiment. It never," he went on to add, "needed lawyers who are also statesmen more than it needs them now; needs them in its courts, in its legislatures, in its seats of executive authority; lawyers who can think in the terms of society itself."

This at least is evident, that if you and I belong to a great calling it is a calling in which we have a great responsibility. We can do much to influence opinion, and the history of our law and the character of our tradition render it easy for us to attain to that unity in habit of thought and sentiment which is the first condition of combined action. That is why I do not hesitate to speak to you as I am doing.

And having said so much I now submit to you my second point. The law has grown by development through the influence of the opinion of society guided by its skilled advisers. But the law forms only a small part of the system of rules by which the conduct of the citizens of a state is regulated. Law, properly so called, whether civil or criminal, means essentially those rules of conduct which are expressly and publicly laid down by the sovereign will of the state and are enforced by the sanction of compulsion. Law, however, imports something more than this.

As I have already remarked its full significance cannot be understood apart from the history and spirit of the nation whose law it is. Moreover, it has a real relation to the obligations even of conscience, as well as to something else which I shall presently refer to as the general will of society. In short, if its full significance is to be appreciated, larger conceptions than those of the mere lawyer are essential; conceptions which come to us from the moralist and the sociologist, and without which we cannot see fully how the genesis of law has come about. That is where writers like Bentham and Austin are deficient. One cannot read a great book like the "Esprit des Lois" without seeing that Montesquieu had a deeper insight than Bentham or Austin, and that he had already grasped a truth which, in Great Britain at all events, was to be forgotten for a time.

Besides the rules and sanctions which belong to law and legality, there are other rules with a different kind of sanction which also influence conduct. I have spoken of conscience, and conscience, in the strict sense of the word, has its own court. But the tribunal of conscience is a private one and its jurisdiction is limited to the individual whose conscience it is. The moral rules enjoined by the private conscience may be the very highest of all. But they are enforced only by an inward and private tribunal. Their sanction is subjective and not binding in the same way on all men. The very loftiness of the motive which makes a man love his neighbour more than himself, or sell all his goods in order that he may obey a great and inward call, renders that motive in the highest cases incapable of being made a rule of universal application in any positive form. And so it was that the foundation on which one of the greatest of modern moralists, Immanuel Kant, sought to base his ethical system, had to be revised by his successors. For it was found to reduce itself to little more than a negative and therefore barren obligation to act at all times from maxims fit for law universal; maxims which, because merely negative, turned out to be inadequate as guides through the field of daily conduct. In point of fact, that field is covered in the case of the citizen only to a small extent by law and legality on the one hand, and by the dictates of the

individual conscience on the other. There is a more extensive system of guidance which regulates conduct and which differs from both in its character and sanction. It applies, like law, to all the members of a society alike without distinction of persons. It resembles the morality of conscience in that it is enforced by no legal compulsion. In the English language we have no name for it, and this is unfortunate, for the lack of a distinctive name has occasioned confusion both of thought and of expression. German writers have, however, marked out the system to which I refer and have given it the name of "*Sittlichkeit.*" In his book "*Der Zweck im Recht*" Rudolph von Jhering, a famous professor at Göttingen, with whose figure I was familiar when I was a student there nearly forty years ago, pointed out, in the part which he devoted to the subject of "*Sittlichkeit,*" that it was the merit of the German language to have been the only one to find a really distinctive and scientific expression for it. "*Sittlichkeit*" is the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is "bad form" or "not the thing" to disregard. Indeed, regard for these obligations is frequently enjoined merely by the social penalty of being "cut" or looked on askance. And yet the system is so generally accepted and is held in so high regard that no one can venture to disregard it without in some way suffering at the hands of his neighbours for so doing. If a man maltreats his wife and children, or habitually jostles his fellow-citizen in the street, or does things flagrantly selfish or in bad taste, he is pretty sure to find himself in a minority and the worse off in the end. But not only does it not pay to do these things, but the decent man does not wish to do them. A feeling analogous to what arises from the dictates of his more private and individual conscience restrains him. He finds himself so restrained in the ordinary affairs of daily life. But he is guided in his conduct by no mere inward feeling, as in the case of conscience. Conscience and, for that matter, law, overlap parts of the sphere of social obligation about which I am speaking. A rule of conduct may, indeed, appear in more than one sphere, and may consequently have a twofold sanction. But the guide to

which the citizen mostly looks is just the standard recognized by the community; a community made up mainly of those fellow-citizens whose good opinion he respects and desires to have. He has everywhere round him an object lesson in the conduct of decent people towards each other and towards the community to which they belong. Without such conduct and the restraints which it imposes there could be no tolerable social life, and real freedom from interference would not be enjoyed. It is the instinctive sense of what to do and what not to do in daily life and behaviour that is the source of liberty and ease. And it is this instinctive sense of obligation that is the chief foundation of society. Its reality takes objective shape and displays itself in family life and in our other civic and social institutions. It is not limited to any one form, and it is capable of manifesting itself in new forms and of developing and changing old forms. Indeed, the civic community is more than a political fabric. It includes all the social institutions in and by which the individual life is influenced, such as are the family, the school, the church, the legislature and the executive. None of these can subsist in isolation from the rest; together they and other institutions of the kind form a single organic whole; the whole which is known as the nation. The spirit and habit of life which this organic entirety inspires and compels are what, for my present purpose, I mean by "*Sittlichkeit.*" "*Sitte*" is the German for custom, and "*Sittlichkeit*" implies custom and a habit of mind and action. It also implies a little more. Fichte defines it in words which are worth quoting and which I will put into English: "What, to begin with," he says, "does '*Sitte*' signify, and in what sense do we use the word? It means for us, and means in every accurate reference we make to it, those principles of conduct which regulate people in their relations to each other, and which have become matter of habit and second nature at the stage of culture reached, and of which therefore we are not explicitly conscious. Principles, we call them, because we do not refer to the sort of conduct that is casual or is determined on casual grounds, but to the hidden and uniform ground of action which we assume to be present in the man whose action is not deflected and from which we can pretty

certainly predict what he will do. Principles, we say, which have become a second nature and of which we are not explicitly conscious. We thus exclude all impulses and motives based on free individual choice, the inward aspect of '*Sittlichkeit*,' that is to say morality, and also the outward side, or law, alike. For what a man has first to reflect over and then freely to resolve is not for him a habit in conduct, and in so far as habit in conduct is associated with a particular age it is regarded as the unconscious instrument of the time spirit."

The system of ethical habit in a community is of a dominating character, for the decision and influence of the whole community is embodied in that social habit. Because such conduct is systematic and covers the whole of the field of society the individual will is closely related by it to the will and spirit of the community. And out of this relation arises the power of adequately controlling the conduct of the individual. If this power fails or becomes weak the community degenerates and may fall to pieces. Different nations excel in their "*Sittlichkeit*" in different fashions. The spirit of the community and its ideals may vary greatly. There may be a low level of "*Sittlichkeit*," and we have the spectacle of nations which have even degenerated in this respect. It may possibly conflict with law and morality, as in the case of the duel. But when its level is high in a nation we admire the system, for we see it not only guiding a people and binding them together for national effort, but affording the most real freedom of thought and action for those who in daily life habitually act in harmony with the general will.

Thus we have in the case of a community, be it the city or be it the state, an illustration of a sanction which is sufficient to compel observance of a rule without any question of the application of force. This kind of sanction may be of a highly compelling quality, and it often extends so far as to make the individual prefer the good of the community to his own. The development of many of our social institutions, of our hospitals, of our universities, and of other establishments of the kind, shews the extent to which it reaches and is powerful. But it has yet higher forms in which it approaches very nearly to the level of the obligation of con-

science, although it is distinct from that form of obligation. I will try to make clear what I mean by illustrations. A man may be impelled to action of a high order by his sense of unity with the society to which he belongs; action of which, from the civil standpoint, all approve. What he does in such a case is natural to him, and is done without thought of reward or punishment, but it has reference to standards of conduct set up by society and accepted just because society has set them up. There is a poem by the late Sir Alfred Lyall which exemplifies the high level that may be reached in such conduct. The poem is called "Theology in Extremis," and it describes the feelings of an Englishman who had been taken prisoner by Mahometan rebels in the Indian mutiny. He is face to face with a cruel death. They offer him his life if he will repeat something from the Koran. If he complies no one is likely ever to hear of it, and he will be free to return to England and to the woman he loves. Moreover, and here is the real point, he is not a believer in Christianity, so that it is no question of denying his Saviour. What ought he to do? Deliverance is easy and the relief and advantage would be unspeakably great. But he does not really hesitate, and every shadow of doubt disappears when he hears his fellow-prisoner, a half-caste, pattering eagerly the words demanded. He himself has no hope of heaven and he loves life:

"Yet for the honour of English race
May I not live and endure disgrace.
Ay, but the word if I could have said it,
I by no terrors of hell perplext.
Hard to be silent and have no credit
From man in this world, or reward in the next,
None to bear witness and reckon the cost
Of the name that is saved by the life that is lost.
I must begone to the crowd untold
Of men by the cause which they served unknown,
Who moulder in myriad graves of old,
Never a story and never a stone
Tells of the martyrs who die like me
Just for the pride of the old countree."

I will take another example, this time from the literature of ancient Greece.

In one of the shortest but not least impressive of his dialogues, the "Crito," Plato tells us of the character of Socrates, not as a philosopher, but as a good citizen. He has been unjustly condemned by the Athenians as an enemy to the good of the state. Crito comes to him in prison to persuade him to escape. He urges on him many arguments, his duty to his children included. But Socrates refuses. He chooses to follow, not what anyone in the crowd might do, but the example which the ideal citizen should set. It would be a breach of his duty to fly from the judgment duly passed in the Athens to which he belongs, even though he thinks the decree should have been different. For it is the decree of the established justice of his city state. He will not "play truant." He hears the words, "Listen, Socrates, to us who have brought you up," and in reply he refuses to go away in these final sentences: "This is the voice which I seem to hear murmuring in my ears, like the sound of the flute in the ears of the mystic; that voice, I say, is murmuring in my ears, and prevents me from hearing any other. And I know that anything more which you may say will be vain."

Why do men of this stamp act so, it may be when leading the battle line, it may be at critical moments of quite other kinds? It is, I think, because thay are more than mere individuals. Individual they are, but completely real, even as individual, only in their relation to organic and social wholes in which they are members, such as the family, the city, the state. There is in every truly organized community a common will which is willed by those who compose that community, and who in so willing are more than isolated men and women. It is not, indeed, as unrelated atoms that they have lived. They have grown, from the receptive days of childhood up to maturity, in an atmosphere of example and general custom, and their lives have widened out from one little world to other and higher worlds, so that, through occupying successive stations in life, they more and more come to make their own the life of the social whole in which they move and have their being. They cannot mark off or define

their own individualities without reference to the individualities of others. And so they unconsciously find themselves as in truth pulse-beats of the whole system, and themselves the whole system. It is real in them and they in it. They are real only because they are social. The notion that the individual is the highest form of reality, and that the relationship of individuals is one of mere contract, the notion of Hobbes and of Bentham and of Austin, turns out to be quite inadequate. Even of an everyday contract, that of marriage, it has been well said that it is a contract to pass out of the sphere of contract, and that it is possible only because the contracting parties are already beyond and above that sphere. As a modern writer, F. H. Bradley of Oxford, to whose investigations in these regions we owe much, has finely said: "The moral organism is not a mere animal organism. In the latter the member is not aware of itself as such, while in the former it knows itself and therefore knows the whole in itself. The narrow external function of the man is not the whole man. He has a life which we cannot see with our eyes, and there is no duty so mean that it is not the realization of this, and knowable as such. What counts is not the visible outer work so much as the spirit in which it is done. The breadth of my life is not measured by the multitude of my pursuits, nor the space I take up amongst other men; but by the fulness of the whole life which I know as mine. It is true that less now depends on each of us as this or that man; it is not true that our individuality is therefore lessened, that therefore we have less in us."

There is, according to this view, a general will with which the will of the good citizen is in accord. He feels that he would despise himself were his private will not in harmony with it. The notion of the reality of such a will is no new one. It is as old as the Greeks, for whom the moral order and the city state were closely related, and we find it in modern books in which we do not look for it. Jean Jacques Rousseau is probably best known to the world by the famous words in which he begins the first chapter of the "Social Contract": "Man is born free, and everywhere he is in chains. Those who think themselves to be the masters of others cease not to be greater slaves than the

people they govern." He goes on in the next paragraph to tell us that if he were only to consider force and the effects of it, he would say that if a nation was constrained to obey and did obey it did well, but that whenever it could throw off its yoke and did throw it off it acted better. His words, written in 1762, became a text for the pioneers of the French Revolution. But they would have done well to read further into the book. As Rousseau goes on we find a different conception. He passes from considering the fiction of a social contract to a discussion of the power over the individual of the general will, by virtue of which a people becomes a people. This general will, the *Volonté générale*, he distinguishes from the *Volonté de tous*, which is a mere numerical sum of individual wills. These particular wills do not rise above themselves. The general will, on the other hand, represents what is greater than the individual volition of those who compose the society of which it is the will. On occasions this higher will is more apparent than at other times. But it may, if there is social slackness, be difficult to distinguish from a mere aggregate of voices, from the will of a mob. What is interesting is that Rousseau, so often associated with doctrine of quite another kind, should finally recognize the bond of a general will as what really holds the community together. For him, as for those who have had a yet clearer grasp of the principle, in willing the general will we not only realize our true selves, but we may rise above our ordinary habit of mind. We may reach heights which we could not reach, or which at all events most of us could not reach, in isolation. There are few observers who have not been impressed with the wonderful unity and concentration of purpose which an entire nation may display—above all in a period of crisis. We see it in time of war, when a nation is fighting for its life or for a great cause. We have seen it in Japan and we have seen it still more recently among the people of the Balkan Peninsula. We have marvelled at the illustrations with which history abounds of the general will rising to heights of which but few of the individual citizens in whom it is embodied have ever before been conscious even in their dreams.

In his life of Themistocles Plutarch tells us how even in time

of peace the leader of the Athenian people could fashion them into an undivided community and inspire them to rise above themselves. It was before the Persians had actually threatened to invade Attica that Themistocles foresaw what would come. Greece could not raise armies comparable in numbers to those of the Persian Kings. But he told his people that the oracle had spoken thus: "When all things else are taken within the boundary of Cecrops and the covert of divine Cithaeron, Zeus grants to Athena that the wall of wood alone shall remain uncaptured, which shall help thee and thy children." The Athenian citizens were accustomed in each year to divide among themselves the revenue of their silver mines at Laurium. Themistocles had the daring, so Plutarch tells us, to come forward and boldly propose that the usual distribution should cease, and that they should let him spend the money for them in building a hundred ships. The citizens rose to his lead, the ships were built, and with them the Greeks were able at a later date to win against Xerxes the great sea-fight at Salamis, and to defeat an invasion by the hosts of Persia which, had it succeeded, might have changed the course of modern as well as ancient history.

By such leadership it is that a common ideal can be made to penetrate the soul of a people and to take complete possession of it. The ideal may be very high, or it may be of so ordinary a kind that we are not conscious of it without the effort of reflection. But when it is there it influences and guides daily conduct. Such idealism passes beyond the sphere of law, which provides only what is necessary for mutual protection and liberty of just action. It falls short, on the other hand, in quality of the dictates of what Kant called the categorical imperative that rules the private and individual conscience, but that alone; an imperative which therefore gives insufficient guidance for ordinary and daily social life. Yet the ideal of which I speak is not the less binding, and it is recognized as so binding that the conduct of all good men conforms to it.

Thus we find within the single state the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient, in the vast majority of the events of daily life, to

secure observance of general standards of conduct without any question of resort to force. If this is so within a nation, can it be so as between nations? This brings me at once to my third point. Can nations form a group of community among themselves within which a habit of looking to common ideals may grow up sufficiently strong to develop a general will, and to make the binding power of these ideals a reliable sanction for their obligations to each other?

There is, I think, nothing in the real nature of nationality that precludes such a possibility. A famous student of history has bequeathed to us a definition of nationality which is worth attention. I refer to Ernest Renan, of whom George Meredith once said to me, while the great French critic was still living, that there was more in his head than in any other head in Europe. Renan tells us that: "Man is enslaved neither by his race, nor by his language, nor by his religion, nor by the course of rivers, nor by the direction of mountain ranges. A great aggregation of men, sane of mind and warm of heart, creates a moral consciousness which is called a nation." Another acute critic of life, Matthew Arnold, citing one still greater than himself, draws what is in effect a deduction from the same proposition. "Let us," he says, "conceive of the whole group of civilized nations as being, for intellectual and spiritual purposes, one great confederation, bound to a joint action and working towards a common result; a confederation whose members have a due knowledge both of the past, out of which they all proceed, and of each other. This was the ideal of Goethe, and it is an ideal which will impose itself upon the thoughts of our modern societies more and more."

But while I admire the faith of Renan and Arnold and Goethe in what they all three believed to be the future of humanity, there is a long road yet to be travelled before what they hoped for can be fully accomplished. Grotius concludes his great book on War and Peace with a noble prayer: "May God write," he said, "these lessons—He who alone can—on the hearts of all those who have the affairs of Christendom in their hands. And may He give to those persons a mind fitted to understand and to respect rights, human and divine, and lead them to recollect

always that the ministration committed to them is no less than this, that they are the governors of man, a creature most dear to God."

The prayer of Grotius has not yet been fulfilled, nor do recent events point to the fulfilment as being near. The world is probably a long way off from the abolition of armaments and the peril of war. For habits of mind which can be sufficiently strong with a single people can hardly be as strong between nations. There does not exist the same extent of common interest, of common purpose, and of common tradition. And yet the tendency, even as between nations that stand in no special relation to each other, to develop such a habit of mind is in our time becoming recognizable. There are signs that the best people in the best nations are ceasing to wish to live in a world of mere claims, and to proclaim on every occasion "Our country, right or wrong." There is growing up a disposition to believe that it is good, not only for all men but for all nations, to consider their neighbours' point of view as well as their own. There is apparent at least a tendency to seek for a higher standard of ideals in international relations. The barbarism which once looked to conquest and the waging of successful war as the main object of statesmanship seems as though it were passing away. There have been established rules of international law which already govern the conduct of war itself, and are generally observed as binding by all civilized people, with the result that the cruelties of war have been lessened. If practice falls short of theory, at least there is to-day little effective challenge of the broad principle that a nation has as regards its neighbours duties as wells as rights. It is this spirit that may develop as time goes on into a full international "*Sittlichkeit.*" But such development is certainly still easier and more hopeful in the case of nations with some special relation than it is within a mere aggregate of nations. At times a common interest among nations with special relations of the kind I am thinking of gives birth to a social habit of thought and action which in the end crystallizes into a treaty; a treaty which in its turn stimulates the process that gave it birth. We see this in the case of Germany an

Austria, and in that of France and Russia. Sometimes a friendly relationship grows up without crystallizing into a general treaty. Such has been the case between my own country and France. We have no convention excepting one confined to the settlement of old controversies over specific subjects; a convention which has nothing to do with war. None the less, since in that convention there was embodied the testimony of willingness to give as well as to take, and to be mutually understanding and helpful, there has arisen between France and England a new kind of feeling which forms a real tie. It is still young and it may stand still or diminish. But equally well it may advance and grow, and it is earnestly to be hoped that it will do so.

Recent events in Europe and the way in which the great Powers have worked together to preserve the peace of Europe, as if forming one community, point to the ethical possibilities of the group system as deserving of close study by both statesmen and students. The "*Sittlichkeit*" which can develop itself between the peoples of even a loosely-connected group seems to promise a sanction for international obligation which has not hitherto, so far as I know, attracted attention in connection with international law. But if the group system deserves attention in the cases referred to, how much more does it call for attention in another and far more striking case!

In the year which is approaching a century will have passed since the United States and the people of Canada and Great Britain terminated a great war by the Peace of Ghent. On both sides the combatants felt that war to be unnatural and one that should never have commenced. And now we have lived for nearly a hundred years, not only in peace, but also, I think, in process of coming to a deepening and yet more complete understanding of each other, and to the possession of common ends and ideals; ends and ideals which are natural to the Anglo-Saxon group and to that group alone. It seems to me that within our community there is growing an ethical feeling which has something approaching to the binding quality of which I have been speaking. Men may violate the obligations which that feeling suggests, but by a vast number of our respective citizens

it would not be accounted decent to do so. For the nations in such a group as ours to violate these obligations would be as if respectable neighbours should fall to blows because of a difference of opinion. We may disagree on specific points and we probably shall, but the differences should be settled in the spirit and in the manner in which citizens usually settle their differences. The new attitude which is growing up has changed many things and made much that once happened no longer likely to recur. I am concerned when I come across things that were written about America by British novelists only fifty years ago, and I doubt not that there are some things in the American literature of days gone past which many here would wish to have been without. But now that sort of writing is happily over, and we are realizing more and more the significance of our joint tradition and of the common interests which are ours. It is a splendid example to the world that Canada and the United States should have nearly four thousand miles of frontier practically unfortified. As an ex-war minister, who knows what a saving in unproductive expenditure this means, I fervently hope that it may never be otherwise.

But it is not merely in external results that the pursuit of a growing common ideal shews itself when such an ideal is really in men's minds. It transforms the spirit in which we regard each other, and it gives us faith in each other:—

"Why, what but faith, do we abhor
And idolize each other for—
Faith in our evil or our good,
Which is or is not understood
Aright by those we love or those
We hate, thence called our friends or foes."

I think that for the future of the relations between the United States on the one hand, and Canada and Great Britain on the other, those who are assembled in this great meeting have their own special responsibility. We who are the lawyers of the New World and of the old mother-country possess, as I have said to you, a tradition which is distinctive and peculiarly our own. We have been taught to look on our system of justice not as

something that waits to be embodied in abstract codes before it can be said to exist, but as what we ourselves are progressively and co-operatively evolving. And our power of influence is not confined to the securing of municipal justice. We play a large part in public affairs, and we influence our fellow-men in questions which go far beyond the province of the law, and which extend in the relations of society to that "*Sittlichkeit*" of which I have spoken. In this region we exert much control. If, then, there is to grow up among the nations of our group, and between that group and the rest of civilization, a yet further development of "*Sittlichkeit*," has not our profession special opportunities of influencing opinion which are coupled with a deep responsibility? To me, when I look to the history of our calling in the three countries, it seems that the answer to this question requires no argument and admits of no controversy. It is our very habit of regarding the law and the wider rules of conduct which lie beyond the law as something to be moulded afresh as society develops, and to be moulded best if we co-operate steadily, that gives us an influence perhaps greater than is strictly ours; an influence which may in affairs of the state be potently exercised for good or for evil.

This, then, is why, as a lawyer speaking to lawyers, I have a strong sense of responsibility in being present here to-day, and why I believe that many of you share my feeling. A movement is in progress which we, by the character of our calling as judges and as advocates, have special opportunities to further. The sphere of our action has its limits, but at least it is given to us as a body to be the counsellors of our fellow-citizens in public and in private life alike. I have before my mind the words which I have already quoted of the present President of the United States, when he spoke of "lawyers who can think in the terms of society itself." And I believe that if, in the language of yet another President, in the famous words of Lincoln, we as a body in our minds and hearts "highly resolve" to work for the general recognition by society of the binding character of international duties and rights as they arise within the Anglo-Saxon group, we shall not resolve in vain. A mere common

desire may seem an intangible instrument, and yet, intangible as it is, it may be enough to form the beginning of what in the end can make the whole difference. Ideas have hands and feet, and the ideas of a congress such as this may affect public opinion deeply. It is easy to fail to realize how much an occasion like the assemblage in Montreal of the American Bar Association, on the eve of a great international centenary, can be made to mean, and it is easy to let such an occasion pass with a too timid modesty. Should we let it pass now I think a real opportunity for doing good will just thereby have been missed by you and me. We need say nothing; we need pass no cut and dried resolution. It is the spirit and not the letter that is the one thing needful.

I do not apologize for having trespassed on the time and attention of this remarkable meeting for so long, or for urging what may seem to belong more to ethics than to law. We are bound to search after fresh principles if we desire to find firm foundations for a progressive practical life. It is the absence of a clear conception of principle that occasions some at least of the obscurities and perplexities that beset us in the giving of counsel and in following it. On the other hand, it is futile to delay action until reflection has cleared up all our difficulties. If we would learn to swim we must first enter the water. We must not refuse to begin our journey until the whole of the road we may have to travel lies mapped out before us. A great thinker declared that it is not philosophy which first gives us the truth that lies to hand around us, and that mankind has not to wait for philosophy in order to be conscious of this truth. Plain John Locke put the same thing in more homely words when he said that "God has not been so sparing to men to make them two-legged creatures, and left it to Aristotle to make them rational." Yet the reflective spirit does help, not by furnishing us with dogmas or final conclusions, or even with lines of action that are always definite, but by the insight which it gives; an insight that develops in us what Plato called the "synoptic mind"; the mind that enables us to see things steadily as well as to see them whole.

And now I have expressed what I had in my mind. Your

welcome to me has been indeed a generous one and I shall carry the memory of it back over the Atlantic. But the occasion has seemed to me significant of something beyond even its splendid hospitality. I have interpreted it, and I think not wrongly, as the symbol of a desire that extends beyond the limits of this assemblage. I mean the desire that we should steadily direct our thoughts to how we can draw into closest harmony the nations of a race in which all of us have a common pride. If that be now a far-spread inclination, then indeed may the people of three great countries say to Jerusalem "Thou shalt be built," and to the temple "Thy foundation shall be laid."

We notice that the successful career of usefulness of the American Bar Association has incited among some members of the profession in England a desire for something similar in Great Britain, and the visit of Lord Haldane to this country and the part he has taken in the recent conference in Montreal has emphasized the suggestion. It certainly does seem strange that nothing of the character of the American Bar Association has grown up in the motherland. The reason is probably that the Inns of Court there do some of the work which a general Association would take up; but this is only partial, and does not get the profession together as a whole. The Law Societies there and the Law Societies in this country have their own work to do, and have not attempted to do that which the Bar Association aim at doing. Whether they might have done so but have failed in so doing may be a question. Probably there is plenty of work for all.

THE TINKERS' ACT.

Among the statutes which we now look for as a matter of course in the annual volume of statutes is "the Statute Law Amendment Act." This Act is now well known in the profession as "the Tinkers' Act," and includes the amendments to a variety of statutes of the most diverse character. Considering the

multiplicity of amendments which are thus made from time to time in the statute law, one would imagine that a benevolent government would so arrange the Act in question that the task of keeping track of amendments would be made as easy as possible. One very simple method of arranging the Tinkers' Act would be to place the various sections in the chronological order of the statutes amended. For example, all amendments to the R.S.O. should come first and in the order of the statutes amended; and all amendments of statutes subsequent to the Revised Statutes should be arranged in the chronological order of such statutes. This arrangement would facilitate the noting of the amendments. Unfortunately the precedent was set of making no such arrangement, and the Tinkers' Act has always been without order or arrangement, and might also be called "the Higgledy Piggledy Act." The latest edition deals with the statutes in the following fashion. It begins, s. 1, with 7 Edw.; ss. 2, 3, 4, with 10 Edw.; s. 5, back to 7 Edw.; ss. 6 and 7, back to 10 Edw.; ss. 8 and 9, 9 Edw.; s. 10, 8 Edw.; ss. 13-15, back to 10 Edw.; ss. 16-17, back to 9 Edw.; s. 18-19, back to 10 Edw.; s. 20, 1 Geo. V.; s. 10, back to 10 Edw.; ss. 22 and 23, 1 Geo. V.; s. 10, back to 10 Edw.; s. 25, back to 1 Geo. V.; s. 26, back to 10 Edw.; s. 27, back to 1 Geo. V.; s. 28, back to 10 Edw.; ss. 29-32, back to 1 Geo. V.; ss. 33-37, 2 Geo. V.; s. 38, back to 9 Edw.; s. 39, back to 2 Geo. V.; s. 40, back to 1 Geo. V.; ss. 41-43, back to 2 Geo. V.; then s. 44, back to 1 Geo. V.; s. 45, 63 Vict.; s. 49, R.S.O.; s. 50, back to 1 Geo. V. and 2 Geo. V. Could any arrangement of this statute be more ridiculous? It has absolutely no method either as to subject matter or dates. We note by s. 20, another sub-section 3 is added to s. 25 of the former Act, there being already one sub-section 3 to that section. This section also furnishes a good illustration of the legislative method. It amends the Act by adding s. 11a and adding a sub-section to s. 25. Any ordinary person would place the addition of s. 11a first, but the framers of the statute, with a perverse regard for the order of things, places the addition to s. 25 first. It is much to be wished that a person with an orderly mind had the arrangement of the statutes.

THE EXECUTION OF DEEDS.

The Court of Appeal in the recent case of *Re Seymour, Fielding* v. *Seymour*, 108 L.T. Rep. 549, (1913) 1 Ch. 475, decided an important point on the law of deeds, holding that the acknowledgment by a lady of a deed purporting to have been executed under a power of attorney given by her amounted to a re-delivery of the instrument as her deed. It is proposed in this article to investigate the meaning of the formalities in vogue for executing deeds and to inquire into the law touching this subject so that the significance of the recent case may be the better appreciated.

When a person after signing a deed goes through the apparently empty formality of placing his finger on the seal (generally a small circular piece of red paper stuck on to the document) and repeats the words dictated to him, "I deliver this as my act and deed," he little appreciates the significance of the words he uses. Very often, indeed, in practice, this small formality is dispensed with, the signing both by the person executing and the witness to his signature being deemed the important part of the execution ceremony. Yet the cabalistic words mentioned above have their meaning—a fact which will be fully appreciated upon a perusal of the judgments of the Lords Justices in the recent case.

Questions concerning the valid execution of deeds necessarily involve further questions of the essential characteristics of a valid deed. A deed is a legal institution of ancient origin, and definitions of deeds abound in ancient legal text-books. Thus, various definitions are to be found in such books as Sheppard's Touchstone, Termes De La Ley, and the old Digests. But these definitions are anything but satisfactory. This is due, no doubt, largely to the fact that circumstances have altered. Thus, at one time few of the parties to a deed could write their names, and signing and even attestation was consequently little in vogue; sealing by the executing party being better fitted to the habits and capabilities of the public in general: see *per* Chief Justice Holt in *R.* v. *Goddard*, 3 Salk. 171; *Cherry* v. *Heming*, 4 Ex. 631, at p. 636. Again, the transmutation of property was anciently more frequently evidenced by the giving of physical possession than it is now. Paper has largely taken the place of parchment—

a fact due to improved methods of manufacture rendering the article more durable than was formerly the case.

The ancient definitions of deeds lay much weight upon the necessity of parchment as a ground for a valid deed. It is said that an eccentric person who had perused an ancient text-book and had there learnt that two of the essentials of a valid deed were, first, that there should be writing, and, secondly, that the writing should be on parchment, conceived the idea of having the terms of the document inscribed on the skin of his back—an operation which was subsequently successfully carried out. Whether he submitted to the painful process of having hot sealing wax placed upon him is not known. But his legal advisers were able to persuade him to abandon his scheme by impressing on him the necessity for delivery to validate the document (a matter which he had overlooked) and to adopt the less sensational course of having the document drawn up in the usual way. Thus an interesting point in the law of evidence remains undecided—*viz.*, whether, in the circumstances, the court would have required production of the original or would have allowed secondary evidence of its contents to have been given in its place.

Lord Coke enumerates no less than ten essentials to a valid deed: Co. Litt. 35*b*. But some of his essentials concern the subject-matter of the transaction rather than the requirements of a valid deed or of its due and proper execution. He mentions, however, the necessity for writing on parchment or paper, and the necessities of sealing and delivery, and in another passage (Co. Litt. 171*b*) he says that a deed "signifieth in the common law an instrument consisting of three things, *viz.*, writing, sealing, and delivery, comprehending a bargaine or contract between party and party, man or woman."

A striking feature of the old definitions of deeds is the weight placed on their feature as evidence of a contract. Little or nothing is said of their aspects as grants of interests in property. "A deed," said Chief Justice Bovill, referring to these definitions in *Reg.* v. *Morton*, 28 L.T. Rep. 452, L. Rep. 2 C.C.R. 22, at p. 27, "is described as being something in the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, a power

of attorney, a release, or a disclaimer. I would go further and say that any instrument delivered as a deed, and which either itself passes an interest, or property, or is in affirmance or confirmation of something whereby an interest or property passes, is a deed."

A document is not a deed merely because it is sealed. Many kinds of documents are made under seal and yet are not deeds. As instances of such, probates of wills, certificates of magistrates, and awards may be mentioned: see *Reg.* v. *Morton*, *sup.*; *Chanter* v. *Johnson*, 14 M. & W. 408, at p. 411, *per* Baron Parke. Yet sealing is one of the essential attributes of a deed. It is more essential to a valid deed from one point of view than signature. Signature by the executing party is in theory of law unnecessary: *R.* v. *Goddard*, *sup.*; *Cromwell* v. *Grunsden*, 2 Salk. 462.

Here we may notice a controversy which has from time to time been raised whether a deed duly sealed and delivered, but not signed, is valid in cases where the Statute of Frauds requires a transaction to be evidenced by a document signed by the person to be charged. The view expressed by Barons Parke, Alderson, and Rolfe in *Cherry* v. *Heming*, 4 Ex. 631, at p. 636, is no doubt the correct one—namely, that the statute only struck at parol agreements and transactions, and not at agreements and transactions evidenced by the most solemn form of document known to the law. Consequently where a deed has been executed by sealing and delivery the Statute of Frauds does not apply.

Attestation by witnesses stands in much the same position as regards the validity of a deed, *qua* deed, as does signature by the executing party. In other words, attestation is in theory unnecessary: see *Garrett* v. *Lister*, 1661, 1 Lev. 25. But both are desirable as working for efficacy. Just as the efficacy of a legal document is secured by the fullness and clearness of its terms, so also is the efficacy of a deed, as an item of evidence—as a proving medium, to use an unconventional term—secured by the readiness with which its authenticity can be established. In practice, signing by the executing party and attestation by a witness or witnesses is almost universally adopted as a custom

of expediency. There are, of course, numerous occasions where such formalities are made necessary by statute; and other occasions will occur to the reader where signing and attestation are necessary, such, *e.g.*, where the document exercises a power, formalities for the exercise of which have been prescribed by the donor of the power.

There can be no doubt but that delivery is by far the most important part of the formalities observed in executing a deed. Yet it is the one part upon which least stress is usually made in practice. In the words of Mr. Justice Keating in *Tupper* v. *Foulkes*, 9 C.B.N.S. 797, at p. 803, the operative part of the ceremony is the delivery. "Where a contract," said Baron Martin in *Xenos* v. *Wickham*, 14 C.B.N.S. 435, at p. 473, "is to be by deed, there must be delivery to perfect it. This is a positive absolute rule of the common law, which nothing but an Act of Parliament can alter, and which, in my judgment, ought not to be frittered away." The reason why delivery holds in law such an important place in the formalities attending the execution of a deed is no doubt due to the fact that it is the overt act which most unequivocally evidences the intention of the party delivering it to adopt the document as of binding force. The whole significance of the act of executing a deed is that the person executing it deliberately adopts it as binding upon him. By the outward act of delivery all question of intention to the contrary is placed beyond doubt. Intention, of course, is the foundation of the whole matter.

There are some interesting authorities upon the question what amounts to the delivery of a deed. "No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it," said Mr. Justice Blackburn in *Xenos* v. *Wickham*, 16 L.T. Rep. 800, L. Rep. 2 H.L. 296, at p. 312 "The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to execute it as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over saying, 'I deliver this as my deed' but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well."

In *Stanton* v. *Chamberlain*, Owen 95, an action of debt was brought on a bond, and the defendant raised the plea *non est factum*—in other words, that he had not executed it. The jury found that the defendant sealed the bond and cast it on the table, and the plaintiff came and took it up and carried it away without saying anything. The question raised was whether this amounted to a delivery of the bond. The judges resolved that if the jury had found that the defendant had sealed the bond and cast it on the table towards the plaintiff, to the intent that the plaintiff should take it as his deed, and the plaintiff had taken the bond and went away, that would have been a good delivery. And the same would have been the case had the plaintiff, after sealing and casting it on the table, taken it up and gone away with it at the command or with the consent of the defendant. But inasmuch as the jury found that the defendant had only sealed it and cast it on the table, and the plaintiff took it and went away with it, the court held that there had not been a sufficient delivery because it might have been that the defendant sealed the document intending to reserve it to himself until other things had been agreed. The report continues: "But it was said that it might be accounted to be defendant's deed because it is found that he sealed it, and cast it on the table, and the plaintiff took it, etc., and it is not found that the defendant said anything, and therefore, because he did not say anything, it will amount to his consent *nam qui tacet consentire videtur.*" This presumably was counsel's argument. The report concludes: "But to this it was answered, that it is not found that the defendant was present when the plaintiff took it, and if the defendant had sealed, and went away, and then the plaintiff came and took it away, then clearly it is not the deed of the defendant."

The last-mentioned case admirably illustrates the whole principle underlying the law's necessity for delivery. Notwithstanding the fact that it was decided so long ago as the year 1587, it may be said to be the leading case on the law of delivery of deeds. There are other cases much to the same effect. They go to shew that some act of consent on the part of the person setting up a plea of *non est factum* suffices to make a delivery

valid. In *R.* v. *Longnor* (1883), 4 B. & Ad. 647, an indenture had been prepared for binding a boy apprentice. The apprentice and his father, both being unable to write, procured a third person to write their names opposite two of the seals. The document was not read over to them, but the boy immediately afterwards took it to the master and left it with him, afterwards stating that when he did so he considered himself bound. The boy entered the master's service under the indenture. The court held that the indenture was sufficiently executed and delivered.

In passing, it may be observed that it is well established that the mere fact that a deed is retained by the executing party does not of itself prevent the court holding the execution of the deed to have been perfected by the delivery by that party: see *Xenos* v. *Wickham*, 16 L.T. Rep. 800, L. Rep. 2 H.L. 296.

Sometimes delivery is merely confirmatory. That is to say the act of delivery, or the conduct which is taken to amount to delivery, is not intimately associated with the other parts of the ceremony of execution, but follows perhaps at some distance of time. This is sometimes called redelivery. It occurs where there has been some defect in the original execution so that a party is not bound by the provisions of the document. By his subsequent act of redelivery he adopts the document as his deed and thereby becomes bound by it. Redelivery may therefore be defined as an acknowledgment made subsequently to the purported execution of a document purporting to be the deed of the person making such acknowledgment that the document is a deed of that person, and binds him according to its tenor: see *Tupper* v. *Foulkes*, 9 C.B.N.S. 797; *Hudson* v. *Revett*, 5 Bing. 368. Like the question of delivery, the question of redelivery is an overt act from which intention is presumed. But in both cases the question of intention is a question of fact.

In the recent case, mentioned in the opening lines of this article, the material facts were as follows: A lady desired to make a gift of certain chattels to her daughter who resided with her, and she gave instructions that a deed should be prepared. This was done, and the document was executed for her by her attorney. Subsequently, in 1898, the document was brought by her legal

adviser and read over to her, and it was arranged that she should send him the original inventory of the chattels and that he should keep it with the document. The inventory was accordingly afterwards sent by her to him inside a wrapper on which she had written some words to the effect that the chattels were then the property of the daughter. The power of attorney was not in the possession of her legal adviser, nor had it been prepared by him. Subsequently the house where the mother and daughter resided was sold, and most of the chattels were taken to another residence and some of them to other houses belonging to the mother. Some of the chattels were from time to time disposed of by the mother. The daughter was subsequently placed under medical care, and ceased to reside with her mother, who in certain proceedings swore an affidavit as to the kindred and property of the daughter, but did not mention the chattels comprised in the deed of gift. On the death of the mother it transpired that the power of attorney was not sufficiently wide to authorise the execution of the deed. Her trustees applied to the court to have the ownership of the chattels determined. It was claimed on behalf of the daughter that there had been a redelivery of the document by the mother so as to make it a valid deed.

The Court of Appeal, affirming the decision of Mr. Justice Joyce, held that the mother had redelivered the document so as to make it a valid deed passing the property in the chattels to the daughter. This notional redelivery was held to have taken place at the interview in 1898, when, as the evidence shewed, the mother was put in full possession of the provisions of the deed. In the words of Lord Justice Buckley, 108 L.T. Rep. 549, (1913) 1 Ch., at p. 489, at that interview she had in substance said: "I acknowledge that as my deed; take it and keep it as such."

The case is a clear modern authority upon the question of redelivery of deeds and is peculiar in this, that heretofore the authorities on this question have dealt with deeds made for valuable consideration, whereas in this case the redelivered deed was a voluntary deed of gift.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

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SALE OF GOODS—CONTRACT FOR GOODS TO BE MADE—BREACH OF CONTRACT BY PURCHASER—MEASURE OF DAMAGES.

In re Vic Mill (1913), 1 Ch. 465. The Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Hamilton, L.JJ.), have affirmed the judgment of Neville, J. (1913), 1 Ch. 183 (noted ante, p. 185).

SALE OF GOODS—WARRANTY—BREACH OF WARRANTY—SALE OF DISEASED MEAT TO BUTCHER FOR RE-SALE—LOSS OF TRADE—MEASURE OF DAMAGES.

Cointal v. *Myhave* (1913), 2 K.B. 220. This was an action by a retail butcher to recover damages for breach of warranty. The defendants sold to the plaintiff a diseased pig, which was seized as being unfit for human food by an inspector and ordered by a magistrate to be destroyed, and the plaintiff was fined. At the trial, the jury awarded damages in respect of the fine and costs, and also for loss of trade. The question was raised whether these damages were not too remote. Coleridge, J., who tried the action held that they were not.

INFANT—CONTRACT—GOODS SOLD AND DELIVERED — NECESSARIES —FRAUDULENT MISREPRESENTATION AS TO AGE—EQUITABLE RELIEF.

Stocks v. *Wilson* (1913), 2 K.B. 235. In this case the defendant being about twenty years of age represented himself as of full age and agreed to buy of the plaintiff a quantity of goods, which included a lot of curios and works of art. The goods were transferred to him by bill of sale which contained a promise by the defendant to pay the purchase money at a future date, and a license to the plaintiff to resume possession in default of payment. After the purchase the defendant sold some of the goods for £30 and with the knowledge and assent of the plaintiff granted a chattel mortgage of the residue as security for a loan of £100. He failed to pay the purchase money

on the day named. After he came of age judgment was recovered against him by default and a receiving order in bankruptcy was made against him. On an appeal, the receiving order was set aside without prejudice to any action the plaintiff might take for the purpose of enforcing any equitable liability the defendant might have incurred for obtaining the goods by false pretences. The present action was therefore instituted, in which the plaintiff claimed that the defendant should be ordered to pay her the reasonable value of the goods. Lush, J., who tried the action held that, in the circumstances, the defendant was liable to pay the plaintiff the £30 and £100 he had actually received for the goods and gave judgment for those sums, less a set-off to which the defendant was found entitled.

The following passage from his judgment appears to contain a convenient summary of the law:—

That an infant who appears to be of full age, and who has made an express representation that he is of full age fraudulently, and to deceive some other person, incurs an equitable liability under some circumstances is clear enough. He cannot be sued for damages, although he is, generally speaking, liable for a tort; the reason being that a temptation would be offered both to the infant himself, and to other persons to enter into contracts if the other party were able, by obtaining a representation of majority by the infant to make the contract practically effective. For the more complete protection of the infant, the law prevents the other contracting party, not only from suing on the contract, but also from suing for damages, if the fraud is connected with and forms the inducement to the contract. Nor is the infant estopped from proving the true facts; which again, if such an estoppel were permitted, would deprive the infant of the protection necessary for his security. What the Court of equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages or compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled to restore it; if he has obtained money he can be compelled to refund it. If he has not obtained either, but has only purported to bind himself by an obligation to transfer property or pay money, neither in a court of law nor in a court of equity can he be compelled to make good his promise or to make satisfaction for the breach."

PRACTICE— DISOBEDIENCE OF ORDER OF COURT—ABSENCE OF PERSONAL SERVICE—PARTY IN CONTEMPT LEAVING JURISDICTION—WRIT OF SEQUESTRATION.

The King v. *Wigand* (1913) 2 K.B. 419. In this case habeas corpus proceedings had been instituted in regard to the custody of a child, owing to the disputes between her father and mother, and an order was made by Bailhache, J., ordering the father to deliver the child to her mother, with liberty to him to have access to the child at certain specified times, both parents undertaking not to remove the child out of the jurisdiction. The father having taken the child out for a walk omitted to return her to her mother, whereupon the Divisional Court made an order nisi for his attachment, for contempt of the order of Bailhache, J. It then appeared that the father had gone to Germany, and taken the child with him, and consequently could not be personally served with the order nisi. On behalf of the wife, an application was made to make the order nisi for an attachment absolute, and also for a writ of sequestration; the husband was unrepresented on the application. The Divisional Court (Ridley, and Avory, JJ.) made the order asked, dispensing with personal service of notice of the application.

LARCENY—TAXICAB DRIVER—FAILURE TO ACCOUNT TO CAB OWNER FOR HIS SHARE OF TAKINGS—RECEIPT FOR, OR ON ACCOUNT OF, OWNER—LARCENY ACT, 1901 (1 EDW. 7, C. 10), S. 1 (1) *b*—(CR. CODE, S. 347).

The King v. *Messer* (1913) 2 K.B. 421. This was a prosecution for larceny, in the following circumstances. The defendant was the driver of a taxicab, which the owner permitted him to use for the purpose of plying with it for hire, upon the terms that he was to hand over to the owner, a certain percentage of the day's takings, retaining the balance for himself. The defendant did not duly account to the owner for his share of the takings. The defendant was convicted of larceny of the amount of the owner's share of takings, which he had not accounted for; and appealed. The Court of Criminal Appeal (Darling, Hamilton, and Bankes, JJ.), affirmed the conviction, holding that the offence charged was larceny within the meaning of the Larceny Act, 1901 (1 Edw. 7, c. 10), s. 1 (1) *b*—SEE CR. CODE, S. 347.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

BOARD OF RAILWAY COMMISSIONERS.

RE APPLICATION TO CLOSE HIGHWAYS.

Drayton, Ch. Com.] [12 D.L.R. 389.

Highways—Closing—Power of Railway Commission.

The jurisdiction of the Board of Railway Commissioners as to the closing of a highway is limited to the extinguishment of the public right to cross the railway; and this power is ordinarily exercised by first granting permission to divert the highway and afterwards making the order to close the road allowance within the limits of the company's right-of-way after the construction of the new grade crossing on the diverted highway.

Drayton, Ch. Com.] [12 D.L.R. 475.

GRAND TRUNK RY. CO. *v.* CANADIAN PACIFIC RY. CO.

Railways—Crossing by other railway—Overhead bridge—Contract to maintain—Change in traffic conditions.

On it becoming necessary to repair or replace an overhead bridge carrying the tracks of a railway company over the road of another railway company, the latter is bound to provide a structure sufficient for the conditions of modern traffic, although the bridge displaced was ample for the needs at the time it was built, where, by contract, it was required at its own expense to maintain such bridge in a good and safe state, so as not to endanger the property fixed or moveable, of the other company, and to save it from damage due to the construction or non-maintenance of the bridge.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Meredith, C.J., Magee and Hodgins, JJ.A., Sutherland, J.] [12 D.L.R. 512.

COCKBURN *v.* KETTLE.

Malicious prosecution—Termination of proceedings—Rebutting primâ facie case—Compromise.

It may be shewn in defence of an action for malicious prosecution that the termination of a criminal proceeding in the

plaintiff's favour was in fact the result of compromise or agreement, notwithstanding the records shew that the dismissal was based on the prosecutor's statement that he did not have any evidence to offer.

Baxter v. *Gordon Ironsides & Fares Co.*, 13 O.L.R. 598, applied.

A favourable termination of a criminal prosecution for obtaining chattels with intent to defraud, so as to permit the recovery of damages for malicious prosecution, is not shewn where the prosecution was dismissed only upon terms of the prisoner giving security to pay for the property.

In an action for abuse of criminal process by causing an arrest in order to coerce payment of a debt, it is necessary to shew that the proceeding terminated in the plaintiff's favour.

McClermont, for plaintiff. *Washington*, K.C., for defendant.

Clute, Riddell, Sutherland and Leitch, JJ.] [12 D.L.R. 549.

DIXON *v.* DUNMORE.

1. *Parties—Cases as to real estate—Specific performance—Person agreeing with vendor to convey to latter's vendee.*

A landowner who contracted to sell land to a purchaser, who, in turn, agreed to sell it to the plaintiff, is a proper party to an action for specific performance of the latter agreement, where, with full knowledge of such contract, he had agreed with his vendee to convey the land to the plaintiff in furtherance of the contract of re-sale.

2. *Contracts—Mutuality—Contract for sale of land.*

Where the defendant, who had contracted to sell land to a purchaser, agreed with him to convey it directly to the plaintiff, to whom the defendant's vendee had re-sold it, upon the remainder of the purchase money due being paid him, there is sufficient mutuality between the plaintiff and the defendant to permit the specific performance of the agreement to convey to the plaintiff.

J. J. Gray, for plaintiff. *Bradford*, K.C., for defendant.

Mulock, C.J.Ex., Riddell, Sutherland and Leitch, JJ.] [12 D.L.R. 390.

TOWN OF WATERLOO *v.* CITY OF BERLIN.

Courts—Jurisdiction—Matters under jurisdiction of Railway and Municipal Board.

The courts will not entertain a suit for an accounting of profits from the operation of a railway by two municipalities under a formal agreement executed not voluntarily but in conformity to an order of the Ontario Railway and Municipal Board, since the matter was one exclusively within the jurisdiction of the Board.

Town of Waterloo v. *City of Berlin*, 7 D.L.R. 241, affirmed.

M. K. Cowan, K.C., for plaintiffs. *Du Vernet*, K.C., and *Sims*, for defendants.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [12 D.L.R. 402.

GREENLAW *v.* CANADIAN NORTHERN RY. CO.

Railways—Liability for damages—Killing animals—Defective fence—Animals at large under by-law.

Cattle turned out to graze on the highways as authorized by a municipal by-law are not "at large through the negligence or wilful act or omission of the owner" so as to relieve a railway company, under sec. 294(4) of the Railway Act, R.S.C. 1906, ch. 37, as amended by 10 Edw. VII. ch. 50, sec. 8, from liability for running down animals that came upon its right-of-way at a place other than a highway crossing, by reason of defects in the fencing which the railway company was under a statutory obligation to maintain.

G. H. Clark, K.C., for defendants. *C. L. St. John*, for plaintiff.

Full Court.] [12 D.L.R. 556.

BOX *v.* BIRD'S HILL SAND CO.

1. *Assignment for creditors—Unscheduled security—Proof of claim in assignment proceedings—Loss of security.*

A company that proves a claim against an estate assigned for the benefit of creditors does not lose the benefit of security it holds because it was not valued in the assignment proceedings.

Box v. *Bird's Hill Sand Co.*, 8 D.L.R. 768, affirmed.

2. *Estoppel—By silence—Failure of company to claim lien on shares—Effect of purchase acquiring notice before passing of legal title.*

A company is not estopped from claiming a lien on shares of its stock for an indebtedness from the holder to the company, as against a purchaser from the latter, on the ground that the representative of the company consented to the sale without claiming its lien, of which the purchaser did not have notice at the time of sale, but of which he was informed before receiving an assignment of the stock certificate, and paying over the purchase money.

Box v. *Bird's Hill Sand Co.*, 8 D.L.R. 768, affirmed.

3. *Corporations and companies—By-law creating lien on shares for debt due company—Power to make.*

Power to adopt a by-law creating a lien in favour of a company upon the shares of a stockholder in respect to his indebtedness to it is conferred by the Joint Stock Companies Act, R.S.M. 1902, ch. 30.

Montgomery v. *Mitchell*, 18 Man. L.R. 37, followed.

4. *Corporations and companies—Lien on shares for holder's debt to company—Purchaser without notice—Duty to inquire.*

A by-law of a company creating a lien in its favour on shares of a stockholder in respect to his indebtedness to it, is not binding on a purchaser of shares for value without notice of such by-law; nor need the purchaser make inquiry as to its existence. (Dictum *per* Cameron, J.)

5. *Corporations and companies—Lien on shares for holder's debt to company—Purchaser with notice.*

The purchaser of company shares takes them subject to a lien of the company for an indebtedness due it from the seller, where the purchaser had notice of the lien before he acquired the legal title to the shares. (Dictum *per* Cameron, J.)

Symington, for plaintiff. *Dennistoun*, K.C., for defendant.

Province of Saskatchewan.

SUPREME COURT.

Full Court.] BOOKER *v.* O'BRIEN. [12 D.L.R. 509.

Real estate broker—Commissions under option contract—Default of principal.

Where as part of an agency agreement with a real estate agent, an option contract was given to him stipulating for the payment out of the purchase money of a sum as "commission" in the event of the sale of the property before the expiry of the option, the optionee is entitled to such commission where the owner refused to sell to a person produced by the optionee within the stipulated time, who was able and willing to buy on the terms of the option.

Booker v. *O'Brien*, 9 D.L.R. 801, affirmed; *Kelly* v. *Enderton*, 9 D.L.R. 472, referred to. As to real estate agents' commissions generally, see Annotation, 4 D.L.R. 531.

Blair, for appellant. *Willoughby*, for respondent.

Book Reviews.

Irish Law Reports. Annotated Reprint. Volume 1. Containing (1894) 1 and 2 I.R.; (1895) 1 I.R. Edinburgh and London: William Green & Sons. Agents for America: The Cromarty Law Book Co., Philadelphia; The Canada Law Book Co., Ltd., Toronto.

Enterprising law publishers certainly add to the expense of a lawyer's equipment, but their productions and reproductions, or at least many of them, are a necessity in these strenuous days.

One of the most important of recent reproductions is a complete verbatim re-issue of all the decisions of the Irish courts from 1766 to 1912. These will appear in one uniform set of about 55 vols. to be issued at the rate of 12 volumes a year, and published at the very low rate of $7.50 per volume, noted with references to later decisions and quotable as the originals.

The profession does not know much nor appreciate the value of these reports, for the simple reason that they are practically unattainable in this country. But as has been truly said "for

rare insight into legal principles for cogent reasoning the Irish Bench has, during the last century been unsurpassed, and yet, because of the scarcity of the reports; and the heavy costs, this rich field of the law has been barred to the profession." The undertaking is a large one, but it will commend itself to the legal profession in all parts of the Anglo-Saxon world.

The number of volumes in the existing reports is 286. These have been reduced by larger paging, slightly smaller type and thin paper, to 55, so that this reproduction will be not only cheaper than the originals, but will occupy much less space and be in every way handier and more valuable by reason of the annotations.

The original paging is retained in the reprint, so that there is no difficulty as to references to the existing volumes.

The publishers have thought well (and properly so) to begin with the later volumes, as being the most useful; intending to work back, and so to complete the issue in the course of four or five years. The first of the six series into which these reports are divided will, therefore, be the Irish Law Reports, Current Series, 1894-1912, and the 38 original volumes will appear in 12 of the reprint.

This is a great undertaking, but will, we doubt not, receive a generous support from the profession.

Cases and Opinions on International Law and Various Points of English Law connected therewith. Collected and digested from English and foreign reports, official documents, and other sources, with notes containing the views of the text-writers on the topics referred to, supplementary cases, treaties, and statutes. By PITT COBBETT, M.A., D.C.L. (Oxon.), of the University of Sydney, New South Wales. London: Stevens & Haynes, 13 Bell Yard, 1913.

A very interesting volume, even to the general reader, and more so, of course, to lawyers interested in International Law.

The book before us is composed of Parts II. and III., War and Neutrality. The previous one dealt with Peace, and the two volumes should be read together. The plan of the book is to give the leading cases on the subjects dealt with, consisting of headnotes, a summary of the facts, and the judgment, with explanatory notes. This is followed by exhaustive notes consisting of the opinions of learned writers, and discussion by the editor.

The cases are not given in the order of date, but by a grouping of the subjects in order. For example, the first article in part II. is the Commencement of War. This is followed by the Effect of War, The Enemy as to Nations, Persons and Goods, Capture and its Incidents, Prize Courts, Termination of War, Indemnity, etc. Part III. commences with the Relation of Neutrality, followed by cases on the Commencement of Neutrality, Neutral Territory, Treatment of Neutrals, Blockade, Contraband of War, Visit and Search, etc.

According to this arrangement we find naturally enough that, under the Commencement of War, the first matter discussed is the controversy between Russia and Japan in 1904, followed by the old case of the "Eliza Ann" in 1813, when that vessel, flying an American flag, was seized by a British ship. Amongst the last cases appears our old friend the Trent affair of 1862, which very nearly brought on a war between Great Britain and the United States. This will be well remembered by those of the profession who in that day put themselves in the hands of drill sargeants, in the expectation of something which happily never happened.

As the best authority on the subject of war says that "wars and rumours of wars" will continue to the end, Peace Conventions to the contrary notwithstanding, the book before us is likely to be of interest for some time to come.

The commendable efforts of the would-be peace makers will find in the appendix a relation to the proceedings of the Hague Convention and subjects there discussed.

Trade Union Law. By HERMAN COHEN, of the Inner Temple, Barrister-at-law. Third edition. London: Stevens & Haynes, Bell Yard; 1913.

The reason for this edition is the recent legislation in England on this subject. The contents of this edition are much the same as the previous one, with some necessary changes and corrections.

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LAW REFORM.

A valued correspondent, a county judge of experience, discusses the above subject in a paper which we publish below. It is one that is old yet ever new. His thought is to simplify procedure and expedite the trial of causes. In this praiseworthy event he simply follows in the footsteps of prominent lawyers in the past and present; for all law reforms in the above directions have been initiated by members of the legal fraternity who have put patriotism above pecuniary considerations.

Apart from any question of the desirability of the changes suggested in this paper, and as to which we at present express no opinion, the time is perhaps not opportune for any further changes. We have recently had a general upheaval and re-adjustment of procedure, and a natural complaint would be that before practitioners can become familiar with a new state of things a further change is suggested. There are those who might consider that we have done enough for the present, and that it would be well to hasten slowly, and see the working out of changes that have been made during the past few years.

In the meantime, many of the suggestions of our correspondent are worthy of consideration, and possibly of adoption. Our readers will be glad to have his views, and we shall be glad to give them the benefit of any criticisms which they may desire to make in reference to the subject touched upon by the learned county judge.

The article he sends us reads as follows:—

"It occurs to me to suggest that it would save expense and expedite litigation if our civil courts were to adopt the procedure of the Mechanics and Wage-Earners' Lien Act and of the County Judges Criminal Court, and thus secure the speedy trial of all

non-jury actions on a day specially fixed for such purpose as soon as the pleadings are at issue, and at the minimum expense to the parties concerned.

The local judges in all the provinces of the Dominion have co-ordinate jurisdiction with the Superior Court judges in the trial of almost all criminal offences, except capital and rare political offences, and about ninety per cent. of all criminal offences sent up for trial in the whole province of Ontario are disposed of before the local judges in the province of Ontario.

The County Judges Criminal Court enables the accused to have his trial take place in a few days after he has been arrested, on a date fixed for such purpose.

About seventy per cent. of all such criminal offences are disposed of by the local judges without a jury, and the province saved the expense of empanelling juries for the trial of such offences. In 1911 there were 65,000 actions commenced in the 330 Division Courts in the province of Ontario, and the local judges held about 2,000 sittings and disposed of all contested cases without a jury, except only in 119 cases.

Division Court sittings are held nearly every month in the county towns, and about every other month in the other divisions, so that litigants have their claims disposed of expeditiously and at the minimum of cost.

In the province of Ontario the jurisdiction of the county courts has been increased from $200 to $500 in personal actions and from $400 to $800 in actions where the claim is liquidated.

This legislation had the effect of increasing the number of writs issued in the county courts about fifty-five per cent., and of decreasing the number of writs in the Supreme Court of Ontario about thirty-three per cent.

In 1912 there were 5,240 actions commenced in the county courts in Ontario, and over seventy-five per cent. of the contested actions were tried by the local judges without a jury.

In many counties the local judges have adopted the practice of disposing of non-jury actions as soon as the parties are ready for trial on a date specially fixed for such purpose.

In 1912 there were 3,666 actions commenced in the Supreme

Court of Ontario. Over sixty-eight per cent. of the contested actions were disposed of by a Judge without a jury.

The local judges have co-ordinate jurisdiction with the judges of the Supreme Court of Ontario in the trial of all actions brought under the Mechanics and Wage-Earners' Lien Act, and apparently dispose of almost all of these actions in their own counties on a date specially fixed for such purpose.

Actions involving the taking of lengthy accounts are frequently referred to the local judges for adjudication.

The Dominion Act now requires that all local judges in all the provinces should possess the same qualifications as judges appointed to the Superior Courts, and when all the local judges throughout Canada have co-ordinate jurisdiction with the Superior Court judges in the trial of offences punishable with imprisonment for life, there seems no reason why the respective Legislative Assemblies should not confer co-ordinate jurisdiction on the local judges to try all actions in the Supreme Courts of the respective provinces.

Such procedure would permit of about seventy-five per cent. of all the contested actions in the Supreme Court of Ontario being tried by the local judges or Superior Court judges without a jury on dates specially fixed for such purpose, as soon as the pleadings are at issue, without any delay or loss of time and at a minimum cost to the parties concerned, as is now done under the Mechanics and Wage-Earners' Lien Act and the Criminal Code.

Three or four judges of the Superior Courts in each of the cities of Halifax, St. John, Montreal, Toronto, Winnipeg, Regina, Edmonton and Vancouver could be assigned to take the non-jury sittings in the respective cities, and the clerk of such respective courts could fix definite days for the trial of each action at least ten days before the date of such trial, and if some actions consumed more time than estimated, a sufficient number of Superior Court judges should be available to dispose of all the actions on the dates fixed by the clerk of such courts.

It seems absurd that litigants with their counsel and witnesses should have to hang around the non-jury sittings in some of the said cities for five or six days at enormous expense before

they can proceed with the trial of their action. The jury cases could in the Supreme Court be set down for trial at the jury sittings of the county courts as well as at the sittings of the Supreme Court, and then no litigant would be required to wait longer than about three months for a jury sitting.

In view of the fact that the local judges in Quebec have exclusive jurisdiction in all actions, and that the local judges in British Columbia have almost similar jurisdiction, and that the jurisdiction of the County Courts in most of the provinces have been increased so that probably over ninety-five per cent. of the civil actions are disposed of by the local judges, the most satisfactory procedure would seem to be for the Legislative Assemblies of the different provinces to practically adopt the Quebec system by giving the Supreme Courts of the provinces jurisdiction in all civil actions involving amounts beyond the jurisdiction of the Division Courts, and give the local judges exclusive jurisdiction in the trial of all actions, and also have the provinces divided into judicial districts, in which judicial districts the resident judges could hold courts throughout such entire judicial district as might be designated by such resident judges from time to time."

We are told by the *Law Times* that there does not seem to be any disposition on behalf of suitors to avail themselves of the extended jurisdiction given by the English County Courts Act, which came into operation in 1905. It is not, therefore, a fact that in England, at all events, suitors desire to take their disputes to local county courts (corresponding to our Division Courts), rather than to be tried by the ordinary tribunals with a more formal procedure. Cheap law, like other cheap things, is not always satisfactory.

THE ALBERTA AND GREAT WATERWAYS RAILWAY CASE.

The decision of the Judicial Committee of the Privy Council in this case, delivered on January 31 last, was on appeal from a judgment in an action brought by the Government of Alberta against the Royal Bank of Canada, the Alberta and Great Waterways Railway Company, and the Canada West Construction Company, to recover $6,042,083.26, with interest, being the proceeds of the sale of certain bonds of the Railway Company, on deposit, at the time of action brought, with the Royal Bank of Canada. It is of epoch-making importance so far as concerns the powers of provincial legislatures in Canada, under the constitution of the Dominion established by the British North America Act, 1867, over "property and civil rights", or, at all events, over "civil rights", in the respective provinces. The following concise statement of the facts of the case will, I think, correctly explain the point decided by the Board, and satisfy the purposes of this article.

The Railway Company was incorporated in 1909 to build a railway within the province of Alberta, and empowered to issue bonds on which to raise the necessary funds for that purpose. These bonds the Government of the province guaranteed under statutory authority of the same year in that regard. They were taken up by a financial house in London, under an arrangement confirmed by Alberta statute and Orders in Council, whereby the money, the proceeds of the bonds, was to be deposited to the credit of a special account in the name of the provincial treasurer in the branch of the Royal Bank at Edmonton, in Alberta, to be paid out, from time to time, to the Railway Company, or its nominee, in monthly payments so far as practicable, as the construction of the lines of railway and the terminals was proceeded with to the satisfaction of the Lieutenant-Governor in Council, and according to certain specifications.

These arrangements were carried out in this way. As the proceeds of the bond issue in London came over to New York, the money was paid into the branch office of the Royal Bank in New York, and credited to the provincial treasurer, to the Railway Special Account. The Bank had its head office in Montreal, and

was incorporated under Dominion Law. The account in Edmonton was opened there in accordance with the arrangements above referred to. No money in specie was sent to the branch office which the Bank possessed there, but the general manager in Montreal arranged for the proper credit of the special account.

Now there appears to have been public uneasiness about the action of the Alberta Government in entering into the arrangements above described, and a Royal Commission of inquiry was appointed. While it was sitting there was a change of Government, and the new administration introduced and passed a statute on the validity of which the question to be decided in the appeal turned.

This statute, which became law on December 16, 1910, after setting out in its preamble that the Railway Company had made default in payment of interest on the bonds, and in construction of the line, and then, ratifying and confirming the guarantee by the province of the bonds, enacted that the whole of the proceeds of sale of the bonds, and all interest thereon, should form part of the general revenue fund of the province free from all claim of the Railway Company, or their assigns, and should be paid over to the treasurer without deduction. It is only fair to the province to add that the Act also provided that, notwithstanding the form of the bonds and guarantee, the province should, as between itself and the Railway Company, be primarily liable on the bonds, and should indemnify the Company against claims under them.

The local Courts held this Act *intra vires*, the Judicial Committee has held it *ultra vires*, and their judgment proceeds entirely upon the construction they place upon that clause of the British North America Act, 1867, which enacts that "in each province the legislature may exclusively make laws in relation to property and civil rights in the province" (sec. 92, sub-sec. 13), their lordships observing that they were not concerned with the merits of the political controversy which gave rise to the statute the validity of which was impeached.

The question involved was simply what is the proper construction of the above broad power of legislation conferred upon provincial legislatures in Canada, without any regard to the fact

that, as their lordships themselves have said in a former judgment like all other powers, it may be abused. In proceeding to construe it, the Board first refers to and illustrates by the case of *The National Bolivian Navigation Company* v. *Wilson*, 5 App. Cas. 176, the well-established principle of the Common Law that when money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use; and that this principle applies when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment, and which has become abortive. The judgment then proceeds as follows:—

"The present case appears to their lordships to fall within the broad principle on which the judgments in that case (i.e. the Bolivian case) proceeded. The lenders in London remitted their money to New York to be applied in carrying out the particular scheme which was established by the statutes of 1909 and the Orders in Council, and by the contracts and mortgage of that year. The money claimed in the action was paid to the Bank as one of those designated to act in carrying out the scheme. The Bank received the money at its branch in New York, and its general manager then gave instructions from the head office in Montreal to the manager of one of its local branches, that at Edmonton in the Province of Alberta, for the opening of the credit for the special account. The local manager was told that he was to act on instructions from the head office, which retained control. It appears to their lordships that the special account was opened solely for the purposes of the scheme, and that when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the Bank at its head office in Montreal the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the province, and the legislature of the province could not legislate validly in derogation of that right. In the opinion of their lordships the effect of the statute of 1910, if validly enacted, would have been to preclude the Bank from

fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable outside the province. The statute was on this ground beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the province, nor directed solely to matters of merely local or private nature within it":

these concluding words referring to another provision of the British North America Act, 1867, which gives provincial legislatures jurisdiction over "generally all matters of a merely local or private nature in the province."

The Board, therefore, has held that the legislature of Alberta could not legislate away the civil right of the bondholders, or the Bank on their behalf, to resist in the Courts of Alberta an action brought by the provincial treasurer of Alberta in those Courts for refusal to pay on his demand the moneys standing to his credit in the Bank at Edmonton, because the civil right of the bondholders to receive back the money advanced by them arose out of Alberta, and was enforceable out of Alberta by action against the Bank in Quebec.

Now, I would like again to observe that the question is one purely of the construction of the exclusive power given to provincial legislatures over civil rights in their respective provinces, without any regard to any injustice or injury which may be perpetrated by those legislatures in its exercise; and I would like to interpolate two further remarks, the apparent egotism of which I trust will be pardoned. The first is, that there is no one who would regret more than I should do any modification of, or restriction on, the right of appeal from our Canadian Courts to the Judicial Committee of the Privy Council. I regard that right of appeal as one of the soundest and healthiest of the many sound and healthy institutions of this most favoured land; and the decisions of the Privy Council upon questions arising under our Constitution as having been of the greatest benefit to this country, and as forming a record of which any Court in the world might be proud.

The second thing I wish to say is, that I have carefully studied

every reported judgment of the Privy Council upon questions arising out of the provisions of the British North America Act, 1867, relating to the distribution of legislative power between the Dominion Parliament and the provincial legislatures, and I have never seen the smallest loophole for criticism, or for doubt as to the correctness of any one of them before this last judgment. And I would consider the comment which I desire to make upon their lordship's judgment in this Alberta case entirely futile, if not quite unwarrantable, were it not that a careful study of the verbatim report of the argument before them shows that the construction for which I would contend was never submitted to the Board. It is a question in my mind whether the restriction which the judgment places upon the power of our provincial legislatures can, or ought to, be accepted as permanent until their lordships have at all events expressly overruled what I will now venture to suggest is the true construction of the clause in question.

The British North America Act, then, gives the provincial legislatures the exclusive power to make laws in relation to "civil rights in the province." When has a man a "civil right in the province?" I submit he has a civil right in the province whenever, and so far as, he can invoke the aid of the Courts of the province by way of action, or by way of defence, quite irrespective of where that civil right arose, and quite irrespective of whether the same state of facts gives him also a civil right which he can enforce, by way of action, or by way of defence, in any other jurisdiction. What is a civil right, except the right to invoke the aid and put into operation the machinery of the civil courts, directly or indirectly? In other words, my submission would have been that when the Imperial Parliament gave our provincial legislatures exclusive jurisdiction over "civil rights in the province," it was simply giving them complete control of their own provincial Courts. And this is entirely consistent with the power given them by the very next clause of the British North America Act, namely, over "the administration of justice in the province, including the constitution, maintenance, and organization of provincial Courts." And, generally, it is entirely consistent with

that autonomy and independence of the provinces, in regard to their own affairs, subject only to the express powers given to the Dominion Parliament, which the Privy Council has established by its former decisions.

It has taken but a few lines to state what my contention is about the meaning of the provincial power over civil rights in the province, but, if sustained, it would have established the validity of the Alberta Act. The province would have been entitled to hold the judgment it had obtained in the Alberta Courts, and to enforce it against any assets of the Royal Bank to be found in Alberta, whatever measure of respect would have been paid to that judgment in other jurisdictions. No doubt the bondholders would still have been free to sue the Bank in Quebec for recovery of their money as advanced on an enterprise which had become abortive; but inasmuch as the province had expressly renewed its guarantee of the bonds, they were, perhaps, not very likely to do so; and what would be the result of any such action on their part, under such anomalous circumstances, I am quite incompetent to say. But whether they took such action or not obviously could not affect the question of the proper construction of the British North America Act.

In a very famous judgment in 1883, *Hodge* v. *The Queen* (1883), 9 App. Cas. at p. 132, in reference to our Constitution, the Judicial Committee laid it down that when the British North America Act enacted that there should be a legislature for each province, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament, in the plenitude of its power, possessed and could bestow. My contention, therefore, is that just as the Imperial Parliament can entirely control the action of the Courts in Great Britain and nullify any existing rights of action or defence, so can our provincial legislatures, so far as their own Courts are concerned, do the same thing, by virtue of their power over "civil rights in the province" and "the administration of justice in the province," saving always matters coming under Federal control.

—A. H. F. LEFROY in *Law Quarterly Review.*

ORAL MODIFICATION OF CONTRACTS REQUIRED BY THE STATUTE OF FRAUDS TO BE IN WRITING.

An ever-recurring question met by practitioners is: When may a written contract be modified, abrogated or discharged by parol, and when may it not? The question most frequently arises in connection with the trial of a cause involving a written contract which one party to the litigation seeks to vary or modify by parol testimony that would contradict the plain provisions of that contract. In such a case the rule is pretty well established that a party will not be heard to contradict the terms of the written agreement. In cases where the meaning of the contract is ambiguous, the court will receive parol testimony, not for the purpose of contradicting any portion of it, but in aid of it, by placing before the court evidence from which may be gathered the real intention of the parties. Because of the frequency with which these rules are applied, they have become too elementary to require citation of the legions of cases that support them.

From a consideration of the cases in which these rules are applied, it at once becomes apparent that the contracts involved are executed agreements. They are instances where one party to the written agreement has performed the stipulations required of him and is seeking to enforce his rights thereunder as a result of his performance, or where one party has offered and tendered performance and is claiming the benefits of an executed contract. Another phase of this question as to oral modification of written agreement is, May parties to a written contract modify, abrogate or discharge that contract while still executory by a subsequent agreement not in writing? In other words, can one party to a written contract enforce the provisions of that contract, when, before it is executed, the parties make a new agreement about the same subject matter, which new agreement is not reduced to writing? These seem simple questions, and yet they have arisen a considerable number of times in various jurisdictions, and the decisions have quite distinctly ranged themselves into two classes, depending upon the nature of the written contract which forms the subject of the controversy. The classification made by the

courts is with reference to whether the written contract is one within the Statute of Frauds or not. If a contract is reduced to writing by the parties of their own volition as a matter of convenience, and not because of any requirement of the statute, such a contract, while still executory, may be modified, abrogated or discharged by a subsequent oral contract regarding the same subject matter. It not being the intention of the writer to discuss the reasons assigned in support of this rule, suffice it to say, that by the substitution of such an oral contract for the written agreement, the parties have not been deprived of their rights, since the new oral contract may be enforced in an appropriate proceeding in the courts. If, on the other hand, the contract sought to be modified, abrogated or discharged is in writing because of the requirement of the Statute of Frauds, then, the courts hold, the subsequent contract cannot rest in parol but must be of equal dignity to the one sought to be modified. The writer purposes to shew the reasoning adopted by the courts in support of this last rule, and to shew some modifications made of it by a recent decision.

The purpose of the Statute of Frauds is clearly expressed in its name. The object of requiring certain contracts to be in writing in order to impart validity, was to prevent frauds arising from allowing the terms of those contracts to rest in parol. It is not strange, then, to see the original purpose of the Statute of Frauds carried forward into the decisions respecting the modification of those contracts, and even their abrogation and discharge. The California court, in the case of *Adler* v. *Friedman*, 16 Calif. 139, has given the reason of the rule adopted in apt language. The plaintiff in the action sought to recover on a promissory note interest at the rate of 2½ per cent. per month in accordance with the terms of the note. On the trial the defendant offered to shew a reduction of the rate of interest by a parol agreement with the plaintiff. The rejection of this offer was assigned as error. In affirming the holding of the trial court, the appellate court said:—

"The general rule is, that extrinsic, verbal evidence is not admissible to contradict or vary the terms of a written agreement.

This rule is not infringed by the admission of such evidence to prove that the written agreement has been discharged, or to establish a new and distinct contract, upon a new consideration, which takes the place of, and is a substitute for the old. In the latter case, however, it must appear that the old agreement is rescinded and abandoned, and it is not competent to shew by parol the incorporation of new terms and conditions. It is obvious, too, that the new agreement must be valid in itself, and such may be made the basis of an action.

"Under our statute, parol evidence is not admissible, in any case, for the purpose of establishing a claim to interest beyond the statutory rate. Such a claim must be evinced by writing, or it is invalid and cannot be enforced. The effect of the proof in this case would have been to establish a contract upon which the plaintiff could not recover. No action can be maintained upon it, and no effect can be given to it as the modification of the terms of the original agreement."

The New York court, in *Hasbrouck* v. *Tappen*, 15 Johns. (N.Y. Com. Law Repts.) 200, was called upon to pass on the same question in an action on covenant to recover stipulated damages. The defendant had entered into a written agreement to convey to the plaintiff certain lands free and clear within a specified time or pay stipulated damages. The plaintiff extended the time orally, and it was contended on the trial that this oral extension of time amounted in law to a waiver of the stipulated damages. The Chief Justice charged the jury that the plaintiff was entitled to a verdict. After saying that such a parol agreement would be within the Statute of Frauds, the court said:

"If this is to be considered a new agreement, which in any manner affects the covenant, the plaintiff's whole remedy is gone. He can no more sustain an action for his real damages to be proved than he can for the stipulated damages; and this was not pretended at the trial. An agreement absolutely void can never be considered as altering, revoking or modifying a valid contract . . . but when the new contract is void in law, and the party without remedy if turned over to it, it would be extremely unjust."

This doctrine was approved in *Jewell* v. *Shroeppel*, 4 Cowen

564, *Baldwin* v. *Munn*, 2 Wendell 405, and in *Delacroix* v. *Bulkley*, 13 Wendell 74, the court said:—

"A void agreement can never be considered an alteration of a valid contract."

The Supreme Court of the United States has also given expression to the same doctrine in similar language. *Swain* v. *Seamens*, 9 Wallace 254, was a case wherein the plaintiff sought to compel the defendant to cancel a certain mortgage, reliance being had upon a verbal modification of the terms of the mortgage. In holding contrary to the contentions of the plaintiff, the Supreme Court of the United States, after pointing out that the Wisconsin statute, which controlled in this case, provided that no interest in land except leases for less than one year shall be created except by operation of law or conveyance in writing, said:—

"Numerous authorities sanction the principle advanced by complainants in cases not within the Statute of Frauds, and which fall within the general rules of the common law, and in such cases it is held that the parties to an agreement though it is in writing, may, at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve or annul the former agreement, if no part of it is within the Statute of Frauds. (Citing cases.)

"Reported cases may also be found where the rule is promulgated without any qualification; but the better opinion is, that a written contract falling within the Statute of Frauds cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. Express decision in the case of *Marshall* v. *Lynn*, 6 Mel. & W. 109, is, that the terms of a contract for the sale of goods falling within the Statute of Frauds cannot be varied or altered by parol; that where a contract for the bargain and sale of goods is made, stating a time for the delivery of them, an agreement to substitute another day for that purpose must, in order to be valid, be in writing."

This court has adhered to the reasons assigned in the foregoing case in a number of later decisions, and especially does it emphasize the distinction between contracts not within the Statute of Frauds and those within its operation in *Emerson* v. *Slater*, 22 How. 42, *Hawkins* v. *U.S.*, 96 U.S. 689, *Chesapeake & O. Canal Co.* v. *Ray*, 101 U.S. 522. In the *Emerson* case the court said:—

"After the contract has been reduced to writing, the parties, in cases not within the Statute of Frauds, may, at any time before the breach of it, by a new contract not in writing, either waive, dissolve, or annul the former contract, or add to, or subtract from, or vary, or qualify the terms of it, and thus make a new contract."

In the *Hawkins* case the following language was used:—

"Subsequent oral agreements between the parties to a written contract not falling within the Statute of Frauds, if founded on a new and valuable consideration, may, when made before the breach of the written contract, have the effect to enlarge the time of performance specified in the written instrument, or may vary any other of its terms, or may waive and discharge it altogether."

In the *Chesapeake & O. Canal Co.* case the court said:—

"The terms of a contract under seal, where the Statute of Frauds is not involved may be varied by a subsequent parol agreement, express or implied."

It is to be noted that the authorities mentioned agree, that to discharge a written contract within the Statute of Frauds by a subsequent agreement between the parties, such subsequent agreement must be of equal dignity with that sought to be discharged, or, in other words, the new agreement must be such a contract as would be valid and capable of enforcement. No exception seems to have been recognized by any of them. Some courts, however, do qualify the rule to the extent that there may be sufficient performance under the new oral agreement as to take it without the Statute of Frauds, or, at least, to make it inequitable to allow a party to stand upon the written agreement after a part performance of the oral modification. Such seems to be the rule adopted by the Washington Supreme Court. The case of *Thill* v. *Johnston*, 60 Wash. 393, was an action brought to compel specific performance of a contract affecting real property, which, under the state statute, must be in writing. The defendant sought to shew that the written contract had been abrogated by a new oral contract. In holding that this was not permissible, the court said:—

"It is contended that the learned trial court erred in not

permitting the appellants to shew that this contract was abrogated by a new contract. The offers of proof on this subject consisted only of oral testimony tending to shew that the parties had abrogated the contract by making a new one. No competent evidence was offered to shew that any new contract having any effect upon the original one was made in writing. This original contract being for the conveyance of an interest in real property, it was, of course, required by law to be in writing. *Nichols* v. *Opperman*, 6 Wash. 618, 34 Pac. 162; *Brewer* v. *Cropp*, 10 Wash. 136 Pac. 866; *Swash* v. *Sharpstein*, 14 Wash. 426, 44 Pac. 862, 32 L.R.A. 796; *Graves* v. *Graves*, 48 Wash. 664, 94 Pac. 481.

"Counsel for appellants invoke the general rule that a written contract may be abrogated or modified by a subsequent parol contract made between the same parties, citing *Tingley* v. *Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098. This rule, however, does not authorize the abrogating of a contract by a new parol contract when the original contract is by law required to be in writing. Such a contract cannot be abrogated or rescinded by a parol contract, *except such new parol contract is accompanied by acts of part performance sufficient to take it out of the requirements of the law that it shall be in writing.* *Spinning* v. *Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319.

"*It is suggested that the offers of proof included a shewing of part performance of the new contract. The only acts of part performance which we regard as at all referable to the new contract sought to be shewn was payment of the consideration therefor, but this of itself is not sufficient to take the place of the requirement of the law that such contract shall be in writing.*"

The next time the Washington court was called upon to pass on this question was in the case of *Gerard-Fillio Co.* v. *McNair*, 68 Wash. 321. In that case, the plaintiff declared on a written contract for commissions for the sale of real property, which under the Statute of Frauds was required to be in writing in order to be valid. The defendant pleaded in defence an oral modification of the written contract, or rather the discharge of the written contract by a subsequent oral contract entered into while the written contract was still executory and tender of

performance. The trial court sustained a motion for judgment on the pleadings in favour of the plaintiff. On appeal, the Supreme Court reversed the holding of the trial court, and in so doing, said:—

"The second question, whether the verbal contract modifying the original written contract was within the Statute of Frauds, is of more difficulty. In this state a contract employing an agent to sell or purchase real estate for a commission must be in writing in order to be valid. Rem. & Bal. Code, sec. 5289. And this court has held that a contract modifying or abrogating a prior written contract required by statute to be in writing must itself be in writing to be obligatory: *Spinning* v. *Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Thill* v. *Johnston*, 60 Wash. 393, 111 Pac. 225. And we have held also that an oral contract for the payment of a commission for selling or purchasing real estate, although fully performed, is not enforceable: *Keith* v. *Smith*, 46 Wash. 131, 89 Pac. 473. These principles are relied on to support the judgment of the trial court; but it seems to us they do not meet the question presented. While it is the rule that a written executory agreement to sell or purchase real estate cannot be rescinded or abrogated by an oral executory agreement to rescind or abrogate it, it does not follow that such an agreement cannot be modified or abrogated by an executed oral agreement. On the contrary it is recognized by our own cases above cited, and it is the rule of all the cases in so far as we are advised, that an executed oral contract to modify or abrogate a written contract, required by the statute to be in writing, can be successfully pleaded as a defence to an action of the original contract. To hold otherwise is to make the Statute of Frauds an instrument of fraud; *for it would be a fraud to allow a person to enforce a contract which he had agreed on sufficient consideration to modify or abrogate after he has accepted the consideration for its modification or abrogation. It is for this reason that equity allows a performance or a substantial part performance of a contract, invalid because not in writing, modifying or abrogating a valid contract to be pleaded as a defence to an action on the valid contract.* To do otherwise would be to allow one of the parties to have the benefit of both

contracts when in equity and good conscience he should have the benefit of but one. The case of *Keith* v. *Smith*, *supra*, is not contrary to these principles. To allow one entering into an oral contract to sell or purchase real estate on commission to recover his commission merely because he had performed the contract would render nugatory the statute requiring such contracts to be in writing. As was said in the case cited, a claim for commission from its very nature cannot be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself."

Certain parts of the two last excerpts from opinions have been italicised to shew that under the holdings of the Washington court a contract, void under the law because not in writing, if partially performed, may be successfully pleaded in defence to an action on the valid contract sought to be abrogated or discharged by the invalid oral contract, although it be substituting for the valid contract one that the plaintiff could not enforce should he seek to make it the basis of an action. In this respect these holdings differ essentially from those quoted earlier in this article. It is also to be noted that in the *Thill* case the court says that the payment of a consideration for the making of the new oral contract would not take it out of the Statute of Frauds sufficiently to permit it to be interposed as a successful defence, while in the *Gerard Fillia Co.* case it expressly says that it would be inequitable to permit the plaintiff to maintain his action on the original written contract "when he has accepted the consideration for its modification or abrogation."

If the holding of the Washington court is a proper modification of the general rule on this subject, though we have been unable to find any cases in other jurisdictions to the same effect, the law would seem to be that in cases where the parties have sought to modify or abrogate a written contract within the Statute of Frauds while still executory by a subsequent oral contract invalid because not in writing, such oral contract may not be pleaded in defence unless the party seeking to enforce the original written contract has received some substantial benefit under the modified oral contract. It is to be noted, however, that the modification

of the rule, to a degree at least, nullifies the purpose of the Statute of Frauds, for it permits the results of litigation to be determined by oral testimony, one of the things primarily sought to be eliminated by the enactment of the statute. We believe the holding of the California courts in the *Adler* case, to the effect that the contract pleaded in defence "must be valid in itself, and such may be made the basis of an action," to be the better rule, for while it may work a hardship in individual cases, a thing that is not uncommon to the law, it would, at least, eliminate the possibility of perjured oral testimony, and render definite and known what would otherwise become indefinite and uncertain.—*Central Law Journal.*

An action for personal injury once instituted passes to the representative of the pursuer on his death. If, however, the injured person dies without raising action, does the right of action transmit to the executors? On this question there have been divergent views. In some cases the opinion was expressed that the moment the delict has taken place the right vests in the sufferer of it, which right is part of his patrimony, and transmits to his executors like any other piece of property. The other view was, and it has been the one which has received favour from recent decisions, particularly *Bern* v. *Montrose Asylum* (20 R. 889), that if a person who has sustained injury dies without taking steps to obtain reparation, his executor cannot take action. This left open the question whether the only way in which the injured person could intimate his intention to enforce his right to reparation was by raising action. The institution of an action certainly is the best proof that the injured person intended to press his claim; but is it the only proof? The Court have now held, in *McEnanay* v. *The Caledonian Railway* ([1913], 1 S.L.T. 373), that there are other ways of manifesting such intention so as to give a title to executors to recover. In that case the claim had been intimated by the deceased to the third party responsible, and the deceased in his will specially assigned to his executors his claim against the railway company. The action was raised after the death of the party injured, but it has been found that his executors had a title to pursue it.—*Law Magazine.*

REVIEW OF CURRENT ENGLISH CASES.

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MORTGAGE — DEBENTURE — FLOATING CHARGE — COMPANY RESTRAINED FROM CREATING FURTHER CHARGE IN PRIORITY TO FIRST DEBENTURES—POWER TO DEAL WITH PROPERTY—SUBSEQUENTLY ACQUIRED PROPERTY—SPECIFIC MORTGAGE SUBJECT TO PROVISIONS OF FIRST MORTGAGE—PRIORITY.

In re Stephenson Co., Poole v. The Company (1913) 2 Ch. 201. This was a contest between debenture holders of a company. In 1899 the company issued debentures secured by a trust deed which constituted a specific and floating charge on the company's property, and whereby it was provided that the company, notwithstanding the charge, might deal with its assets but not to create any further charge over its property generally to rank *pari passu* with or in priority or otherwise than in subordination to the security thereby created. Subsequently the company purchased freeholds, and by a further trust deed the company granted to the trustees certain freeholds, including such newly acquired property, by way of trust, to secure a new issue of debentures subject to the provision of the first deed. The second deed also contained a general charge on all the company's assets subject to the first deed. On behalf of the debenture holders secured by this second deed it was contended that the first deed only prohibited a general charge, but not a specific charge, and that as to the property acquired after the first deed the second debenture holders were entitled to priority over the first deed. But Parker, J., held that the security of the second series of debenture holders was as to all of the property included therein subsequent to the first deed, and this decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Farwell and Kennedy, L.JJ.).

STATUTE OF LIMITATIONS—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT., C. 57)—LIMITATION ACT, 1623 (21 JAC. 1, C. 16)—(STATUTE OF LIMITATIONS (10 EDW., C. 34, ONT.), SS. 20, 49)—DEBTS CHARGED ON LAND—DEBTS PAYABLE OUT OF MIXED FUND—DEBTS WHETHER BARRED AGAINST PERSONAL BUT NOT AGAINST REAL ESTATE.

In re Raggi, Brass v. *Young* (1913) 2 Ch. 206. The facts in this case were that a testator who died in 1907 by his will devised

and bequeathed his residuary estate to trustees upon trust for sale, and out of the proceeds to pay his debts, and to hold the residue upon certain trusts. Shortly after his death the defendant company made a claim for a simple contract debt due by the deceased for £902, which arose in 1903, but took no steps to enforce it. On an application by the trustees to determine whether the defendants were creditors, and for what amount, Warrington, J., held that the testator, by creating a mixed fund and imposing a duty, not on the executors, but on the trustees to pay his debts out of that mixed fund, had created a charge not of a part, but of the whole of the debts on the real estate, and that it could not be said that any part of the debts were attributable to the personal estate; and therefore that no part of the defendant's debt was barred by the Statute of Limitations, although more than six years had elapsed from the date when the debt became due by the testator. The suggestion of Kay, J., *In re Stephens*, 43 Ch.D. 39, 45, that in such circumstances a debt might be barred as to the rateable proportion attributable to the personalty, and kept alive only as to the part attributable to the realty, was held not to be well founded.

SETTLED ESTATES—POWER OF LEASING—TENANT FOR LIFE—STATUTORY POWER—MINING LEASE—"CONTRARY INTENTION"—SETTLED LAND ACT, 1882 (45-46 VICT., c. 38), s. 11—(3-4 GEO. V., c. 20, s. 3 (1) *c* ONT.)

In re Rayer, Rayer v. *Rayer* (1913) 2 Ch. 210. In this case a settlement of lands empowered any male tenant for life in possession, or the trustees, if the tenant for life should be a female or an infant, to grant leases of opened or unopened mines on the settled property, and directed that the whole of the rents or royalties under such leases were to be applied as income. A female tenant for life applied to the court to lease the property under the Settled Land Act, 1882 (see 3-4 Geo. V., c. 20, Ont.), and the question was whether any proportion of the rent must be set aside as capital money under s. 11 of the Act (see Ont. Act s. 3(1)*g*); and Neville, J., held that by the terms of the settlement "a contrary intention" sufficiently appeared, and that in the circumstances therefor no part of the rents need be set aside as capital. It may be well here to note that the revised Settled Estates Act of Ontario, s. 3(1)*g*, which appears to be taken from s. 11 of the English Act, materially varies therefrom, in omitting the words "unless a contrary intention is expressed in the settlement," and also in omitting to state for what purpose the rent is to be set aside.

WILL—CONSTRUCTION—CHARGE OF DEBTS ON LAND AND PERSONALTY IN FOREIGN COUNTRY—MIXED FUND—NON-EXONERATION OF RESIDUARY PERSONALTY—REALTY—PERSONALTY.

In re Smith, Smith v. *Smith* (1913) 2 Ch. 216. This was an administration action, and the question dealt with relates to the proper order for the administration of assets in the following circumstances. By a will made in 1905 the testator, after appointing executors and trustees, gave certain legacies free of duty, and, subject to the payment of the said legacies, duties, debts, and funeral and testamentary expenses, he devised and bequeathed all his real and personal property in the Argentine Republic to his trustees upon trust to sell, and, after payment of the expenses of the sale, to pay the residue to the children of his two brothers in equal shares; and the testator devised and bequeathed the residue of his real and personal estate in trust for the plaintiff. The testator died in 1910 domiciled in England. The question submitted to the court was whether the charge of debts and legacies on the real and personal estate in the Argentine had the effect of exonerating the residuary personal and real estate. Eve, J., held that the charge created by the will was confined in its operation to the Argentine property; that the rule of construction which requires that there must be found in the will not only an intention to charge the realty but also to exonerate the personalty before the latter can be exonerated, applies to a charge on realty situate in a foreign country; that if there had been a mixed fund created the residuary estate might have been exonerated, but that in the present case a mixed fund for payment of debts, etc., had not been created, because the trust for conversion was not for payment of debts and legacies, but only of the balance of the property after payment of debts and legacies, etc. He therefore came to the conclusion that the devise of the Argentine realty charged with payments of debts and legacies made it an auxiliary fund to the personalty, but did not operate to exonerate the personalty from its primary liability; but he also held that as the rule of construction applicable to realty does not apply to personalty, the charge of the debts and legacies on the Argentine personalty did exonerate the residuary personalty of its primary liability therefor.

SETTLEMENT — CONSTRUCTION — HOTCHPOT CLAUSE— — COVENANT TO SETTLE AFTER-ACQUIRED PROPERTY—TRUSTS BY REFERENCE.

In re Fraser, Ind v. *Fraser* (1913) 2 Ch. 224. In this case the construction of a marriage settlement made in 1847 was in ques-

tion, whereby a fund belonging to the husband and another belonging to the wife were settled, subject to life interests to the husband and wife, in trust for such children of the marriage as the husband and wife jointly should appoint, and as to the unappointed part for children in equal shares. Then followed a clause that no child in whose favour an appointment was made should take any share in the unappointed funds without bringing his appointed share into hotchpot. The settlement also contained a covenant by the wife to settle her after-acquired property. The husband and wife appointed the whole of the original trust funds in favour of five of their children—there being two other children in whose favour no appointment was made. Two legacies to the wife came in subsequently and were caught by the covenant. The husband and wife died without making any further appointment, and the question was whether the five children could participate in the unappointed after-acquired property without bringing their appointed shares into hotchpot; and Sargant, J., held that they could not, His Lordship being of opinion that the settlement of the after-acquired property could not be regarded as a separate settlement, but, on the contrary, that the after-acquired property must be treated as a mere accretion to the original trust fund.

MASTER AND SERVANT—TRADE SECRET—SECRET PROCESS—CONFIDENTIAL EMPLOYMENT—IMPLIED OBLIGATION OF SERVANT—INFORMATION AS TO SECRET PROCESS ACQUIRED DURING EMPLOYMENT—INFORMATION COMMITTED TO MEMORY—IMPROPER USE OF INFORMATION—INJUNCTION.

Amber Size & Chemical Co. v. *Menzel* (1913) 2 Ch. 239. This was an action to restrain the defendant, a former employee of the plaintiffs, from disclosing or making use of information acquired by him as to a secret process of the plaintiffs while in their employment. The court found as a fact that the plaintiffs had a secret process, and that the defendant while in their employment had acquired material information in reference to it—although the details of the process were not disclosed to the court. The question was raised by the defence whether, in the absence of any express contract, the defendant could be restrained from making use of the information he had acquired while in the plaintiffs' service; and Astbury, J., who tried the action, held that there was an implied contract by an employee not to disclose secret information acquired in the course of his employment, and he granted the injunction, but intimated that he felt some difficulty

in granting it, owing to the process not having been disclosed to the court, but suggested that if it should become necessary to enforce the order, the plaintiffs could then, under proper safeguards against it being otherwise divulged, make known the process to the court.

GIFT OF CHATTELS—VOID DEED—ACKNOWLEDGMENT—VOLUNTARY GIFT—SUBSEQUENT DELIVERY OF DEED EXECUTED BY ATTORNEY WITHOUT AUTHORITY BY DONOR IN PERSON—PASSING PROPERTY.

In re Seymour, Fielding v. *Seymour* (1913), 1 Ch. 475. The simple question in this case was whether a deed of gift which had been executed by attorney without authority, had been subsequently ratified by the donor. The facts were that in February, 1896, the deed of gift of certain chattels was executed by one Leighton in assumed exercise of a power of attorney from Mrs. Seymour in favour of her daughter Miss Seymour. In 1898, Mrs. Seymour's solicitor, amongst other business read over the deed of gift to her, and made the following note of the interview so far as it related to the deed. "Attending you as to the deed of gift to Miss S., and you desired us to retain the same on her behalf. You would have a copy made of the original inventory and would send us the original to keep with the deed. And also as to the P.A. given to S. Leighton and reminding you that this had been prepared by Mr. Marston and had never been in our possession." Mrs. Seymour afterwards sent the inventory to her solicitors with a note in her own handwriting: "Mr. Seymour's catalogue with annotations of pictures and works of art at 5 Chesterfield Gardens, now the property of Miss Seymour." The daughter subsequently became insane, and in her affidavit as to her property Mrs. Seymour did not include the articles which were the subject of the deed of gift. By her will, made in 1910, Mrs. Seymour disposed of her pictures, furniture, etc., in trust for her daughter for life, and then for other persons. She died in 1911. It was then discovered that the power of attorney under which Mr. Leighton had assumed to execute the deed of gift was not wide enough for that purpose. Joyce, J., held that the deed of gift had been so acknowledged by Mrs. Seymour, in 1898, as to be in effect a delivery of the deed by her, and therefore that the property in the chattels therein comprised had passed to the daughter; and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Hamilton, L.JJ.).

STATUTE OF LIMITATIONS—SHARE OF PROCEEDS OF SALE OF LAND HELD IN TRUST—REAL PROPERTY LIMITATION ACT, 1833 (3 & 4 W. 4, c. 27), ss. 1, 34—REAL PROPERTY LIMITATION ACT, 1874 (37-38 VICT. c. 57), s. 8—(10 EDW. 7, c. 34, ss. 1, 5).

In re Fox, Brooks v. *Marston* (1913) 2 Ch. 75. In this case Warrington, J., holds that a mortgagor's interest in a share of the proceeds of land held in trust for sale is, under the interpretation clause of the English Statute of Limitations, 1833, s. 1 (see 10 Edw. 7, c. 34, s. 1 (Ont.)), an interest in land, and that after the lapse of twelve (in Ontario ten) years, in the absence of any payment or acknowledgment, the right of the mortgagee to recover it is barred under s. 34, (Ont. Act, s. 5).

MARRIAGE SETTLEMENT—COVENANT TO SETTLE PROPERTY—INTEREST IN EXPECTANCY.

In re Mudge (1913) 2 Ch. 92. In this case a covenant to settle property contained in a marriage settlement was sought to be enforced. The circumstances were as follows. In 1864 a testatrix gave a fifth share of her residuary estate to her daughter Williamina for life, with remainder to her children, but if she died without issue (which happened) then to her next of kin as if she had not been married. In 1865 Jane, another daughter of the testatrix, married, and by her marriage settlement covenanted that any real or personal property to which she was then entitled for any estate or interest whatsoever in reversion, remainder or expectancy, should be settled upon the trusts of the settlement. In 1912, Williamina died without issue, leaving Jane her sole next of kin, and Neville, J., held that Jane's interest at the date of her marriage in Williamina's share was not a mere spes successionis, but an "interest in expectancy," and as such was subject to the covenant.

INSURANCE COMPANY—WINDING-UP—CURRENT POLICIES—CLAIMS OF POLICY HOLDERS — CONTINGENT CLAIMS MATURING AFTER WINDING-UP ORDER — "VALUING A POLICY" — MEASURE OF DAMAGES.

In re Law, Car & General Insurance Corporation (1913) 2 Ch. 103. This was a winding-up proceeding against an insurance company, and the question to be determined was the basis on which the claims of certain policy holders were provable. The

policies in question were against risks under the Employers' Liability Act and Workmen's Compensation Acts, and the Court of Appeal (Cozens-Hardy, M.R., and Buckley, and Kennedy, L.JJ.) (reversing Neville, J.) hold that the holders were entitled to prove (1) for any ascertained amounts due under the policies at the date of the winding-up order; and (2) also in respect of liabilities in the shape of weekly payments which had arisen at the date of the winding-up order, the future-accruing payments to be valued as prescribed by the Assurance Companies Act, 1909; and (3) for the value of the policy as an indemnity against future liabilities during the currency of the policy, to be estimated upon the basis of a partial return of the premium. But the court held that he was not entitled to prove in addition in respect of liabilities which may have arisen under the policy after the date of the winding-up order.

ADMINISTRATION—WILL—LEGACY ON RELEASE OF ANNUITY UNDER A SETTLEMENT — DEFICIENCY OF ASSETS — ABATEMENT OF LEGACY.

In re Whitehead, Whitehead v. *Street* (1913) 2 Ch. 56. The point decided by Farwell, L.J., in this case was simply this, viz., that where a legacy is given to a legatee subject to a condition that it shall be accepted in satisfaction of the claims of the legatee under a settlement; in case of a deficiency of assets, such a legacy must abate with all other legacies and is not entitled to any priority over them.

MORTGAGOR AND MORTGAGEE — FORECLOSURE — PARTIES — FIRST MORTGAGE OF ONE SHARE—SECOND MORTGAGE OF THREE SHARES OF THREE CO-MORTGAGORS—RIGHT OF INDEMNITY BETWEEN CO-MORTGAGORS — FORECLOSURE OF FIRST MORTGAGE — CO-MORTGAGORS UNDER SECOND MORTGAGE NOT MADE PARTIES.

Gee v. *Liddell* (1913) 2 Ch. 62. This was a mortgage action in which the facts were somewhat unusual. Three persons, John, William and Walter, were, respectively, entitled to a one-third share in a sum of money under the will of a testator who died in 1860. In 1881 William mortgaged his share to Barlow to secure £1,500. In 1882 John, William and Walter mortgaged their shares to the Equity & Law Life Assurance Society to secure £17,876, subject as to William's share to the prior mortgage to Barlow. As between the three mortgagors it was agreed that

John and his share should be primarily liable for £13,407, William for £3,129 and Walter for £1,340, and that each of them should contribute in these proportions to the payment of the debt, and should indemnify the others against the payment of the proportion for which he was primarily liable. In 1882 Barlaw brought a foreclosure action against William and foreclosed his mortgage, but John and Walter were not made parties to the action. The fund which was the subject of the mortgages having been paid into Court, this was an application for the payment out of the money to the parties entitled, and it was held by Warrington, J., that John and Walter were necessary parties to the foreclosure proceedings against William and that as against John and Walter the foreclosure of William's share was ineffectual, and as to them and persons claiming under them William's share must be first applied in payment of the Barlow mortgage, and secondly in making good its due contribution to the mortgage to the insurance company, but as to William and the persons claiming under him the foreclosure remained absolute, and the balance of his share after making the payments aforesaid belonged to Barlow and those claiming under him.

COMPANY ARTICLES OF ASSOCIATION—BOARD OF DIRECTORS—APPOINTMENT OF MANAGING DIRECTOR—POWER TO REVOKE APPOINTMENT OF MANAGING DIRECTOR.

Nelson v. *Nelson* (1913) 2 K.B. 471. In this case the plaintiff, who had, under power conferred on the board of directors of the defendant company, by its articles of association, been appointed the managing director of the company, sued the company for damages for breach of the agreement, under which he was appointed. The articles provided that the board of directors might appoint a managing director, and also revoke the appointment. By the agreement with the plaintiff, he was appointed on the terms that he should hold office so long as he continued a director, and retained his due qualification, and efficiently performed the duties of the office. Subsequently, while the plaintiff was fulfilling the conditions of the agreement, the board of directors revoked his appointment. Scrutton, J., who tried the action, held that the articles of association did not empower the board to revoke the appointment at will, but for good cause only, and, therefore, that the plaintiff was entitled to recover.

SOLICITOR AND CLIENT—UNCERTIFICATED SOLICITOR—COSTS AND DISBURSEMENTS—RETAINER OF COSTS OUT OF CLIENT'S MONEYS —SOLICITORS ACT, 1874 (37-38 VICT. C. 68), S. 12.

Browne v. *Barber* (1913) 2 K.B. 553, is a case which shows that there is a difference between English and Ontario statute law, in regard to solicitors practising without a certificate. The English Solicitors Act, 1874, s. 12, provides that, where an unqualified person acts as a solicitor, he can recover no fee reward, or disbursement, for anything so done. It was therefore held, in this case, by the Court of Appeal (Williams, Farwell, and Kennedy, L.JJ.), affirming Channell, J., that, where an unqualified person acts as a solicitor, he cannot retain out of any moneys of his client, which come to his hands, any fee, reward, or disbursement. Under the Ontario Act (2 Geo. V. c. 28), a penalty of $40 is imposed on a solicitor practising without a certificate (s. 24); and he is made liable to suspension (s. 25); and he cannot recover any fee, or reward, or disbursement, for anything done by him while imprisoned or suspended (s. 27). By s. 4, persons practising without being admitted, are guilty of a contempt of Court. But the Ontario Act does not appear to contain any similar provision to that of the English Act of 1874 above mentioned. When the Ontario statute was recently under revision, it seems a pity a similar provision to that of the English Act of 1874, was not included.

STATUTE OF LIMITATIONS (21 JAC., C. 16)—(10 EDW. VII. C. 34, SS. 46-49)—TRUST—EXPRESS TRUST—SHIPPING AGENT—SALE OF CARGO AND PAYMENT OF CLAIMS BY AGENT—BALANCE IN AGENT'S HANDS.

Henry v. *Hammond* (1913) 2 K.B. 515. This was an action brought by a principal against his agent, who had been employed by the plaintiff to sell a cargo of goods which had been salved, and out of the proceeds pay all claims and expenses in connection with the cargo. This the defendant did, in 1883, and a balance remained in his hands, which was not paid over to the plaintiff, and of which he did not know. This balance appeared in the defendant's balance sheets from 1884 to 1888 as a debt owing, the name of the vessel carrying the cargo had been first mentioned, but the name of the creditor was not stated, and in 1889 it was carried to profit and loss in his accounts, and thereafter did not appear on the balance sheets. The defendant set up the Statute

of Limitations (21 Jac. 1, c. 16); (see 10 Edw. VII. c. 34, s. 49 Ont.) The plaintiff claimed that the defendant was in the position of an express trustee, and therefore that the Act was no defence. On appeal from a County Court, the Divisional Court (Channell, and Bray, JJ.), held that it was an ordinary commercial transaction in the way of the defendant's business as a shipping agent; that the defendant was not bound to keep the moneys coming to his hands in the course of the transaction, separate from his other moneys, and therefore that he was not in the position of an express trustee, and the Statute was, therefore, a good defence. The mere fact of the existence of a fiduciary relation does not prevent the defence of the Statute.

JUSTICES—SUMMARY JURISDICTION—OMISSION TO INFORM ACCUSED OF HIS RIGHT TO TRIAL BY JURY—WITHDRAWAL OF SUMMONS—JURISDICTION TO HEAR FRESH INFORMATION—(CR. CODE, S. 778, AS AMENDED BY STAT. OF 1909, C. 9).

Davis v. *Morton* (1913) 2 K.B. 479. In this case a Divisional Court (Ridley, Pickford, and Avory, JJ.) determined that where a summons is, after hearing of some of the witnesses, withdrawn because the justice had omitted to inform the accused that he was entitled to be tried by a jury, such withdrawal is not equivalent to a dismissal of the information, and cannot be pleaded in bar to a subsequent information for the same offence.

STATUTE OF LIMITATIONS (21 JAC. 1, C. 16)—(10 EDW. VII. C. 34, S. 49, ONT.)—ACTION COMMENCED "WITHIN SIX YEARS NEXT AFTER THE CAUSE OF SUCH ACTION"—INCLUSION OF DAY ON WHICH CAUSE OF ACTION AROSE—EXPIRATION OF SIX YEARS ON SUNDAY—ISSUE OF WRIT ON FOLLOWING MONDAY—RULE 963—(ONT. RULE 345).

Gelmini v. *Moriggia* (1913) 2 K.B. 549. This was an action on a promissory note which fell due on 22nd September, 1906; the action was commenced on Monday, 23rd September, 1912. The action was tried before Channell, J., who held (1) that in the computation of the six years, under the Statute of Limitations (21 Jac. 1, c. 16), the day on which the note became due must be included; and (2) that the fact that the last day expired on a Sunday, did not entitle the plaintiff to commence his action on the following Monday, and that Rule 963 (Ont. Rule 345), only applied to the doing of things required to be done by

the Rules of Court, and has no effect upon the operation of the Statute of Limitations. This point, however, is now met in Ontario by The Interpretation Act (7 Edw. 7, c. 2) s. 7, which, in such circumstances, would appear to extend the time for bringing an action until the next day which is not a holiday.

LIBEL—INNUENDO—TRADE PUBLICATION—LIST OF DECREES IN ABSENCE—ERRONEOUS ENTRY—IMPUTATION OF INSOLVENCY.

Stubbs v. *Russell* (1913) A.C. 386. This was an appeal in a libel action from a Scotch court. The libel in question was published in a weekly paper published by the defendant purporting to give a list of judgments which had been pronounced in the Small Debts Courts against persons in their absence. The list was headed with a statement that in no case did the publication of the decree imply inability to pay on the part of anyone named. The plaintiff was a tradesman, and in the list of judgments one was stated to have been given against him, the fact being that he had paid the debt sued for and the action had been dismissed. The plaintiff averred that the publication falsely and calumniously represented that he was unable to pay his debts, and the court below had directed an issue to be tried. The House of Lords (Lord Haldane, L.C., and Lords Halsbury, Kinnear and Shaw) were of the opinion that the entry, when read in connection with the explanatory note, was incapable of bearing the defamatory meaning alleged, and that therefore there was no question to go to a jury, and the issue ought to have been disallowed.

FRAUD—CONTRACT INDUCED BY MISREPRESENTATION—APPEAL ALLOWED ON FACTS.

Glasgow & S.W. Ry. v. *Boyd* (1913) A.C. 404 may be here briefly noted as being a case in which the House of Lords reversed the judgment of the Court of Session, in an action to set aside a contract induced by alleged fraudulent misrepresentations, on the facts, their Lordships being of the opinion that the alleged fraud had not been proved.

HEARING IN CAMERA—PUBLICATION OF PROCEEDINGS AFTER TRIAL—CONTEMPT OF COURT—COMMITTAL—APPEAL—CRIMINAL PROCEEDINGS.

Scott v. *Scott* (1913) A.C. 417. This was an appeal from the decision of the Court of Appeal (1912) p. 241 (noted *ante* p. 66),

to the unsatisfactory character of which decision we there drew attention. The case, it will be remembered, arose out of a case of nullity of marriage which had been ordered to be tried in camera. Subsequently to the trial the petitioner, through her solicitor, obtained copies of the notes of evidence and sent them to certain persons in defence of her reputation; whereupon the respondent moved to commit the petitioner and her solicitor for contempt of court in publishing the proceedings of the case after an order had been made that it should be heard in camera. On the return of the motion the parties apologized, but were ordered to pay the costs of the motion. From this order they appealed, and the Court of Appeal held that the proceeding to commit for contempt was in the nature of a criminal proceeding, and therefore that the appeal did not lie. Their Lordships (Lord Haldane, L.C., and Lords Halsbury, Loreburn, Atkinson and Shaw) have given what we think will be regarded as a classical judgment in the case, and have once and for all cleared the air on the points involved in a way which will probably be regarded by the profession and public at large in a very satisfactory manner. In the first place, their Lordships hold that the High Court has not an absolute discretion to direct matrimonial cases to be heard in camera, in the way the former ecclesiastical courts had done, but that matrimonial cases, like all other cases, are *prima facie* to be heard in public, subject, however, to the right of the court to direct a hearing in camera where it is necessary in the interests of justice, and except in the cases of wards of court and lunatics, where the court is exercising a paternal jurisdiction; and that unless it is necessary for the attainment of justice all causes ought to be heard in public. It is not enough that the evidence is likely to be of an unsavoury character, or that the parties agree to a hearing in camera. In the present case their Lordships find there was no valid reason for the order. As to what degree of secrecy is to be observed as to matters heard in camera their Lordships do not lay down any universal rule, but rather the simple principle that it is only where the disclosure would be likely to defeat or interfere with the ends of justice that it can be judicially restrained. In the present case the disclosure had no such effect, and their Lordships held there was in fact no contempt; the order appealed from was reversed with costs. The constitutional aspect of the case is well and vigorously dealt with by Lord Shaw. It may be noted that, in view of the importance of the questions involved and the probability that the respondent might not be represented by counsel, the Attorney-General adopted the unusual course of

providing counsel to argue the case from the respondent's standpoint, and that the costs so occasioned were not thrown upon the respondent.

REGISTRATION OF TITLES—KNOWLEDGE OF UNREGISTERED RIGHTS —RECTIFICATION OF REGISTER.

Loke Yew v. *Port Swettenham Rubber Co.* (1913) A.C. 491. This was an appeal from the Malay Straits Court. In the Malay Straits a Registration of Titles Act is in force which provides that a person named in the certificate of title issued thereunder is entitled to an indefeasible title, except on the ground of fraud or of adverse possession for the prescriptive period. In June, 1910, Eusope was the registered owner of 322 acres of land, 58 acres of which were in the adverse possession of Loke Yew. The plaintiffs by their agent contracted to purchase the 322 acres, and as an inducement to Eusope to sell agreed to make their own arrangements with Loke Yew. The plaintiffs obtained a transfer from Eusope and caused themselves to be registered as owners of the 322 acres, and brought the present action to eject Loke Yew. The Malay Court gave judgment for the plaintiffs, but the Judicial Committee of the Privy Council (Lords Atkinson, Shaw and Moulton) reversed the decision, holding that the plaintiffs, having bought with the knowledge of the defendants' possession, had obtained the transfer by fraud and misrepresentation, and that as the rights of third parties did not intervene, they could not better their position by registration of their title; and that the defendant in the circumstances was entitled to a rectification of the register.

FIRE INSURANCE—POLICY—CONDITION REQUIRING DISCLOSURE OF OTHER INSURANCES—SUBSTITUTION OF OTHER INSURANCES FOR THOSE DECLARED—TRANSFER OF INTEREST—LEASE—(INSURANCE ACT, ONT., 2 GEO. V., C. 33, STATUTORY CONDITIONS 3, 5).

National Protector Fire Ins. Co. v. *Nivert* (1913) A.C. 507. This was an appeal from His Majesty's Supreme Court for the Ottoman Dominions. The action was brought to recover the amount of two policies of insurance on buildings and their contents, which were subject to conditions that the insured should be bound to declare by writing whether there were other insurances, and the same were to be mentioned in the policy itself or by memorandum thereof endorsed thereon by the company.

At the time of effecting the insurance the plaintiff had concurrent insurances which were recorded on the policies. Subsequently these insurances were replaced by other insurances for a slightly larger amount, the excess being due to certain improvements made to the buildings, and additions to the contents. These substituted insurances were not communicated to the defendants, who contended that the omission to notify them thereof rendered the policies void. The Supreme Court had refused to give effect to this contention, and the Judicial Committee of the Privy Council (Lords Atkinson, Shaw, and Moulton) affirmed the decision, holding that the condition in question meant only that the fact that the property covered was further insured should be declared, and that the insured had committed no breach of the condition, and was entitled to recover upon the policies. See The Insurance Act (2 Geo. V. c. 33, Ont.), statutory condition 5. It may be noted that this decision was arrived at notwithstanding that the substituted insurances were effected in other companies than those mentioned in the policies. Another point in the case was, that, pending the policy, the insured had leased the property insured, and it was contended that this constituted a transfer of his interest in the property insured, which under a condition in the policy rendered it void; but this contention also failed. See Ontario Insurance Act, statutory condition 3.

PARLIAMENT—DISQUALIFICATION—CONTRACT WITH THE SECRETARY OF STATE FOR INDIA IN COUNCIL—CONTRACT FOR THE PUBLIC SERVICE—22 GEO. III. c. 45—41 GEO. III. c. 52—21 & 22 VICT. c. 106—(R.S.C. c. 10, s. 14; 8 EDW. VII. c. 5, s. 11, ONT.).

In re Samuel (1912) A.C. 514. This was a matter referred to the Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Halsbury, Loreburn and Dunedin) by an order of His Majesty in Council. The Postmaster General was a member of a firm holding a contract with the Secretary of State for India in Council, and the question submitted to their Lordships was whether this fact disqualified him from sitting and voting as a member of Parliament; and their Lordships held that under 22 Geo. III. c. 45, s. 1 (see R.S.C. c. 10, s. 14; 8 Edw. VII. c. 5, s. 11 Ont.), a contract with the Governor General of India in Council is within the statute, and is a contract on behalf of the Crown, and that the Postmaster was therefore disqualified, and that the Act covers all contracts made for the public service not only in the United Kingdom but anywhere else.

Correspondence.

Toronto, October 1, 1913.

The Editor, CANADA LAW JOURNAL.

Dear Sir,—The writer of the editorial headed "The Tinkers' Act" in your issue of September, 1913, has overlooked the fact that the sections of the Statute Law Amendment Act are arranged in the order preserved in the Revised Statutes. He is quite in error in supposing that there is no method observed in the arrangement of the sections. As to whether the method adopted is the most convenient, there may be some question, but it has been found so by a number of professional men who note their statutes quite as carefully as the writer of the editorial.

As to the amendments to the Coroners' Act to which the writer refers, these will be found in another place in the statutes in their proper order, with other corrections and amendments of the Act. The reason for the duplication of the sections is that it was not thought well that amendments to the same Act should appear partly in one place and partly in another. The amendments to the Coroners' Act having been passed before the Statute Law Amendment Act, the subsequent amendments made by the latter Act were directed to be incorporated in the Act amending the Coroners' Act in the annual volume.

I venture to say that no professional man who has the slightest knowledge of the facts, or who considers the short time allowed for the winding up of the work of the Session, would hesitate to pronounce the criticism uncalled for and unfair.

Yours faithfully,

ALLAN M. DYMOND.

[We gladly publish Mr. Dymond's letter, though we do not accept his concluding remarks. We are still of the opinion that it would be more convenient to the profession if the Statute Law Amendment Acts were, in future, arranged on some such plan as we have suggested. So far as we can see, none of these Acts have ever had any method apparent to the ordinary reader.

Of course, in making the remarks we did, we had no intention of imputing any blame to the Law Clerk. Our sole aim in drawing attention to the matter was, if possible, to secure in future more attention to the arrangement of the sections of this annual Act, so as to facilitate the keeping track of the amendments and render less troublesome to practitioners the labour of annotating the statutes. Mr. Dymond is too good and painstaking an officer not to see the desirability of doing all that can be done in that direction.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, and Leitch, JJ.] [12 D.L.R. 588.

HILL *v.* RICE LEWIS & SON.

Negligence—Dangerous agencies—Defective cartridges—Liability of seller.

A retail vendor is not answerable for personal injury sustained by the purchaser of a sealed box of cartridges of a certain description and make, as the result of the box containing one cartridge of a different kind and of the explosion of the cartridge after it had missed fire because of its being the wrong size, where the plaintiff relied solely on his own judgment and not that of the vendor, in making the purchase.

The Moorcock, L.R. 14 P.D. 64, and *Hamlyn* v. *Wood*, [1891] 2 Q.B. 488, applied.

J. W. McCullough, for plaintiff. *J. D. Montgomery*, for defendants.

Province of Alberta.

SUPREME COURT.

Harvey, C.J., Scott, Simmons, and Walsh, JJ.] [12 D.L.R. 598.

RE CLEARWATER ELECTION (No. 2).

1. *Elections—Disputed ballots—Duty of whom to count.*

Under the Alberta Election Act, 9 Edw. VII, ch. 3, it is the duty of the returning officer and not of a deputy returning officer or of a court of inquiry, to open envelopes containing disputed ballots allowed by such court, and count them. (*Per* Scott, Simmons, and Walsh, JJ.)

Re Clearwater Election, 11 D.L.R. 355, affirmed in part.

2. *Mandamus—Subject of relief—Election—Performance of duty, by returning officer.*

Mandamus will not lie, under sec. 235 of the Alberta Election Act, 9 Edw. VII. ch. 3, to compel a returning officer to open

envelopes containing disputed ballots allowed by a court of enquiry, and add them to election returns, where he has properly added the votes cast, with the exception of the disputed ballots as required by law; since his neglect to add the disputed ballots was not a wilful delay, neglect, or refusal to perform the duties imposed upon him by law; and adequate relief could be obtained on a recount before a District Court judge.

Re Clearwater Election, 11 D.L.R. 355, reversed in part.

3. *Disputed ballots—Power of District Court Judge to count in first instance.*

A District Court judge, on a recount of an election by way of an appeal, has power to open envelopes containing disputed ballots and count those allowed by a court of enquiry.

Frank Ford, K.C., and *Eager*, for H. W. McKinney. *C. C. McCaul*, K.C., for A. W. Taylor. *Alex. Stuart*, K.C., for J. H. Clarke.

Province of Saskatchewan.

SUPREME COURT.

Newlands, Johnstone, Lamont and Brown, J.J.] [12 D.L.R 678.

REX *v.* RATZ.

1. *Criminal law—Accessory as such—Accomplice.*

An accessory before the fact to the crime of murder is an accomplice with his principal within the rule requiring the corroboration of his testimony against the latter. (*Per* Newlands and Brown, JJ.)

Rex v. *Tate*, 21 Cox Cr. Cas. 693, and *Rex* v. *Beauchamp*, 25 Times L.R. 330, followed; *R.* v. *Reynolds*, 15 Can. Cr. Cas. 210, distinguished.

2. *Trial—Homicide—Instructions—Evidence of accomplice.*

A new trial will be granted for the failure of a trial judge to caution the jury, on a trial for murder, against acting on the uncorroborated testimony of an accomplice, who had already been tried and convicted, where there was no corroborating evidence.

H. V. Bigelow, for accused. *T. A. Colclough* (Deputy Attorney-General), for the Crown.

Haultain, C.J., Newlands, Johnstone, and Brown, JJ.] [12 D.L.R. 648.

REX *v.* HUTCHINS.

Evidence—Marriage license issued in United States—Authentication—Bigamy.

A copy of a marriage license and of a return shewing the performance of a ceremony thereunder, is admissible in evidence without further proof, under sec. 23 of the Canada Evidence Act, when certified under the seal of a Court of record of a state of the United States.

A conviction of bigamy cannot be sustained where the sole proof of the second marriage is an admission of the accused that he and the woman "went through a form of marriage."

T. A. Colclough, for the Crown. No one for accused.

Haultain, C.J., Newlands, Lamont, and Brown, JJ.] [12 D.L.R. 656.

REX *v.* QUONG WING.

Constitutional law—Regulations of business—Prohibiting white females frequenting or being employed in places kept or managed by Orientals.

Ch. 17 of the Sask. Statutes of 1912, prohibiting any white woman or girl residing, lodging or working in, or frequenting any restaurant, laundry or other place of business or amusement, kept, owned or managed by a Chinaman, Japanese or other Oriental person, is not *ultra vires*.

Hodge v. *The Queen*, 9 A.C. 117, 132, and *Cunningham* v. *Tomey Homma*, [1903] A.C. 151, specially referred to; *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580, distinguished.

W. B. Willoughby, for appellant. *J. N. Fish*, for respondent.

Province of British Columbia

COURT OF APPEAL.

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [12 D.L.R. 582.

CANADIAN LOAN & MERCANTILE CO. LTD. *v.* LOVIN.

Real estate brokers—Compensation—Failure to complete.

Where an employee of a real estate brokerage company having property listed for sale, introduced a probable buyer who

paid for a ten-day option signed by the owner's representative or agent, and on the option holder electing to buy within the limited period it was discovered that the owner himself had sold the property in the interval, and the company's employee received from the owner's representative a sum of money in lieu of commission as compensation for having lost the sale of the property, the money so paid must be accounted for to the brokerage company without deduction for any payment thereout made by the employee to the option holder without the company's authorization.

M. B. Jackson, for plaintiff, respondent. *D. S. Tait*, for defendant, appellant.

Full Court.] [12 D.L.R. 626.

REX *v.* BOGH SINGH.

Interpreter—Criminal trial—Immaterial omissions—Effect—Perjury—Evidence—Confession.

It is sufficient that an interpreter fairly and faithfully gives the substance of the testimony, omitting any irrelevant details.

On a charge of perjury against a witness speaking in a foreign tongue, it is not essential that the prosecution should prove that every word uttered by the witness in the witness-box had been translated by the interpreter and repeated by him in English so as to be placed upon the official stenographer's notes; it is enough that the court is satisfied on the interpreter's testimony in the perjury trial that he repeated in English all that was material of what the accused had said in a foreign language.

Before the Crown introduces statements made by a prisoner while in custody as evidence of an admission or confession, the onus is on the Crown to shew that there has been no inducement given to make those statements.

R. v. *Bruce*, 12 Can. Cr. Cas. 275, 13 B.C.R. 1, followed.

J. McDonald Mowat, for prisoner. *J. R. Grant*, for Crown.

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [12 D.L.R. 669.

VANNATTA *v.* UPLANDS.

Mechanics' liens—For conveying material to structure—Constructing streets—Hire of teams.

A lien for conveying building materials to the land where they are to be used cannot be acquired under sec. 6 of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154.

Labour performed in making streets, which have not been dedicated as public highways, in a tract of land being sub-divided for the owner's profit, is not work done on public highways for which a lien is denied by sec. 3 of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, but is lienable under sec. 6 of the Act.

One who furnishes a contractor with horses, waggons and drivers for the use on premises he is improving, is, under sec. 6 of the B.C. Mechanics' Lien Act, R.S.B.C. 1911, ch. 154, entitled to a lien for their hire.

Webster v. *Real Estate Imp. Co.* (Mass.), 6 N.E.R. 71, followed.

Maclean K.C., *Higgins* and *Bass*, for appellants, claimants. *Bodwell*, K.C., and *Moore*, for respondents, defendants.

Macdonald, C.J.A., Irving, and Galliher, JJ.A.] [12 D.L.R. 675.

McELMON *v.* B. C. ELECTRIC RY. CO.

Electricity—Injury from—Destruction of building by fire—Crossed wires—Negligence—Lack of safety devices.

Negligence sufficient to render an electric company liable for the destruction of a building from fire originating from an electric current of abnormally high voltage being carried upon wires leading into the building, may properly be inferred from the fact that several hours before the fire the company's high voltage wires became crossed with low potential service wires on the same poles, which trouble had been corrected prior to the fire; where it also appeared that the use of a simple safety device by the electric company on the pole nearest the building would have prevented the abnormally high current entering it, and that the electrical installation for the service of the burned building was not defective.

L. G. McPhillips, K.C., and *Duncan*, for appellants, defendants. *S. S. Taylor*, K.C., and *Brown*, for plaintiff, respondent.

Book Reviews.

The Canadian Law of Banks and Banking, the Clearing House, Currency and Dominion Notes, Bills, Notes, Cheques and other Negotiable Instruments. By JOHN DALATRE FALCONBRIDGE, M.A., LL.B., Barrister-at-Law, one of the Lecturers of the Law Society of Upper Canada. Second edition. Toronto: Canada Law Book Company, Limited. 1913.

The first edition of this valuable work was published in 1907. In this new edition the whole book has been revised, and the Canadian and English cases brought down to date. All

recent legislation affecting the subjects dealt with, such as the currency of 1910 and amendment to the Bank Act, which has just come into force, has been introduced and discussed. The new Bank Act receives the attention of Mr. H. M. P. Eckardt in an interesting article which forms one of the chapters of the book.

A new feature of this edition is a comparison drawn between our Bills of Exchange Act and the Negotiable Instrument Law now in force in most of the States of the American Union. The commercial relations between us and our neighbours to the south of us is so close that the help thus given to Canadian lawyers will be much appreciated.

The contents are given under the following general headings: —Book I., Banking and the Bank Act; Book II., Negotiable Instruments and Bills of Exchange Act, and the cases referred to are collected and noted under appropriate sub-heads.

We have nothing but praise for this most excellent work. It has now become a necessity to all practising lawyers. Bank men and business men will also find it most useful, as they will readily see by glancing at the index and the table of forms.

Barron and O'Brien on Chattel Mortgages and Bills of Sale. A complete annotation of the Provincial statutes dealing with mortgages and sales of personal property. Second revised edition. 1913. Toronto: Canada Law Book Company, Cromarty Law Book Co., Philadelphia.

Many changes have taken place in the law on these subjects since the last edition which appeared seventeen years ago. These have been embodied and noted in the book before us. Our readers are so familiar with this standard work that it is unnecessary to do more than to call attention to this revision.

The Law Quarterly Review, edited by Rt. Hon. Sir Frederick Pollock, Bart., D.C.L., LL.D. July. London: Stevens & Sons, Ltd.

The contents of this interesting number are as follows:— The usual Notes of Cases; Sketches of the Life of John Westlake, K.C.; Constitutional History and the Year Books, The Alberta and Great Waterways Railway Case (by A. H. F. Lefroy, K.C., Toronto); Future Estates; Limitations of Land to Unborn Generations; The Transaction of Sale in the Saxon Times; Powers of Distress and Bills of Sale Act; Our Manor of East Greenwich; Book Reviews, etc.

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THE STATUTE OF FRAUDS AND SOME RECENT CHANGES.

It would be well for the profession in Ontario to scan carefully the forthcoming volume of the Revised Statutes, as presumably they have done the statutes for 1913 recently published. There is one change of considerable importance to which it would be well to call special attention.

By the 17th section of the Statute of Frauds (29 Char. II. c. 3) it is enacted that "no contract for the sale of any goods, wares and merchandises for the price of £10 sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorised."

Doubts long existed as to the application of this section to an executory contract to sell. More than 150 years after the passing of the Statute of Frauds the matter was set at rest by Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 7, which enacted that the provisions of s. 17 "shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." The effect of the above statute was held to modify the 17th section of the Statute of Frauds so far as the word "price" was concerned, and made "value" the standard.

The above section of Lord Tenterden's Act was introduced into this Province, and appears in Con. Stat. U.C. (1859) c. 44, s. 11, and from there was carried into the last revision of the Ontario statute in 1897 at s. 9 of c. 146.

Our new Statute of Frauds (3 & 4 Geo. V. c. 27) would seem to change the law as it enacts (s. 12) that "no contract for the sale of any goods, wares or merchandise for the price of $40 or upwards shall be allowed to be good unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized, and notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of the contract be actually made, procured or provided, or fit or ready for delivery or although some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

As this section is composed partly of the words of the 17th section of the original Statute of Frauds and partly of s. 9 of R.S.O. (1897) c. 146, and as this latter section is repealed by 3 & 4 Geo. V. c. 27, s. 13 (the Act last Session) it would seem that on this point the legislature has deliberately eliminated the question of value from the construction of section 17 of the Statute of Frauds.

It is worthy of note that the word "value" is used in the Imperial Sale of Goods Act of 1893, which is still in force. Sec. 4 of that statute saying "a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action, unless, etc."

It would be interesting to know why the word "value" was introduced in Lord Tenterden's Act, and still more interesting to know why the change from value to price, resulting from s. 12 of the statute of 1913 above referred to, was made, or indeed whether it was intended by that section to alter the law here as it certainly has done. Any light on this subject would be help-

ful. Possibly the difficulty may disappear when the hoped for revision, so long overdue and which the Commissioners think they may be able to give to the public by the end of the year, is complete. It goes without saying that, unless there is some very strong reason to the contrary legislation in this country should as far as possible go on parallel lines with that of the Mother Country.

JUDICIAL CHANGES IN ENGLAND.

Numerous changes may shortly be expected in the English judiciary. The breakdown in the health of Lord Alverstone, Chief Justice of England, which has deprived the country of his services and the Court of Queen's Bench of its Chief Justice for more than eight months, seems to warrant the belief that he will very soon resign the position which he has so well filled. It is said that his successor is almost sure to be Sir Rufus Isaacs, the Attorney-General.

We felt it our duty recently to criticize the action of the Attorney-General in the *Marconi* case, but there was nothing there to touch his personal honour, and his great learning and brilliant talents will be well employed in the exalted and responsible position of Chief Justice of England. Our exchanges say that his appointment would be most satisfactory to the bar.

The mention of his name calls to mind the prominent position taken by men of the Hebrew race in connection with the administration of affairs in Great Britain. We all remember the great Disraeli, for some time Prime Minister of England. The Law Officers of the Crown of the present time are also of that wonderful and ineffaceable race, the Attorney-General being Sir Rufus Isaacs and the Solicitor-General, Sir John Simon. One of the most prominent and brilliant men of the present Cabinet, the Postmaster-General, Mr. Herbert Samuel, is also a Jew. Should the present Attorney-General take the place of

Lord Alverstone it will be another instance of the undying physical and mental vigor of this ancient people.

Two additional Lords of Appeal in Ordinary are to be appointed. It was thought probable that they might be chosen from the present judiciary, but it is said (by cable) that one of them will be the present Advocate-General of Scotland, Mr. Alexander Ure, K.C.

There may be those who will take exception to this appointment and will question whether Lord Haldane has therein carried out the promise he made to get the very best men available. It is said that the Advocate-General when in Parliament made himself obnoxious in a reference to the claim of the Duke of Buccleuch for compensation for damages to his property on the Thames Embankment. Mr. Ure made a statement known by all lawyers acquainted with the case of *Buccleuch* v. *Metropolitan Board of Works* to be incorrect and was twitted for either forgetting his law or disregarding the facts. It is said that the only occasion on which that courteous gentleman and experienced parliamentarian, Mr. Balfour used harsh language about a political opponent, was when he criticised the veracity of Mr. Ure in forcible and picturesque language, the words being that the statement objected to was a "frigid and calculated lie." —We do not vouch for the accuracy of the statement, but it was so reported at the time.

Since the above was written, Sir Rufus Isaacs has been appointed Lord Chief Justice of England. He is succeeded by Sir John A. Simon, K.C., V.O., K.C.M.P., Solicitor-General. S. O. Buckmaster, K.C., succeeds him as Solicitor-General.

THE "TURNTABLE" DOCTRINE IN UNITED STATES.

The "turntable doctrine" is that principle of law enunciated for the first time in this country by the Supreme Court of the United States and followed by some of the state courts to the effect that an adult who places a dangerous agency, which, from its nature is attractive to children, where it is accessible to them, may be liable for the injuries caused thereby, though the children

are trespassers. This is an exception to the general rule that no right of action lies in favour of one who is injured while trespassing or guilty of contributory negligence. The theory on which these cases proceed is that the temptation of an attractive plaything to a child is a thing which must be expected and guarded against, and that the placing of such objects where they are accessible to children is an implied invitation to them. As said above, it is well settled that one owes no duty to keep his premises in a safe condition for the protection of mere trespassers and owes them no duty except the mere duty not to wilfully or wantonly injure them, but it is said that there is a notable exception to this general rule in the case of children. It is thus put by Judge Thompson in vol. 1, section 1024, of his work on Negligence: "A well-grounded exception to the foregoing principle is that one who artificially brings or creates upon his own premises any dangerous thing, which from its nature has a tendency to attract the childish instincts of children to play with it, is bound as a mere matter of public duty, to take such reasonable precautions as the circumstances admit of, to the end that they may be protected from injury while so playing with it or coming in its vicinity. Things of this kind frequently pass under the designation of attractive nuisances."

The term "turntable" is applied to this doctrine because of the frequency with which it has been applied to action against railroads or injuries sustained by reason of that class of machinery and because the first case in this county wherein the doctrine was upheld was such a case, see 17 Wallace 657.

The first case wherein this doctrine was upheld in this country was the *Railroad Co.* v. *Stout*, 17 Wallace 657. In that case a boy was injured while playing in a railroad turntable left unlocked and was allowed a recovery. This doctrine was later reaffirmed by the Supreme Court of the United States in *Railroad Co.* v. *McDonald*, 152 U.S. 262.

Perhaps the most able opinion sustaining those cases is that of the Minnesota court in *Keffe* v. *Railroad Co.*, 21 Minn. 211, where the court said: "Now, what an express invitation would be to an adult, the temptation of an attractive plaything

is to a child of tender years. If the defendant had left this turntable unfastened for the purpose of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff, who had been attracted upon the turntable and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass.

The high character of the United States Supreme Court in which *Railroad Co.* v. *Stout* was decided, constrained many of the state courts to accept its decision as being well founded in legal principle, and for some years the doctrine seemed likely to be approved throughout the country; but the tide is setting strongly in the opposite direction, and it has not been generally accepted by the state courts. On the contrary it has been emphatically repudiated by the courts of last resort in Massachusetts, New York, New Jersey, New Hampshire, Texas, Pennsylvania, Ohio, Virginia and West Virginia.

The opinion in the *Stout* case is not clear and the case is most unsatisfactory. The doctrine there enunciated has been recognized by most of the courts as being a dangerous one if pushed to its logical conclusion and even the courts following the case have applied the rule with extreme caution and sought to hedge it in with limitations by refusing to extend its application beyond that particular class of cases. The Georgia court, in *Ferguson* v. *Railway Co.*, 75 Ga. 637, held that "where a railway company leaves a dangerous machine, such as a turntable, unfastened in a city, on a lot which is not securely inclosed, and where people and children are wont to visit it and pass through it, this is negligence on the part of such company; and where an infant of ten or twelve years of age resorted to the turntable and in riding upon it was dangerously and seriously injured the railroad company is liable for damages for such injury to the infant," but absolutely refused to extend the doctrine to a case in which an infant was drowned by falling into an excavation filled with water on defendant's land, *Savannah, F. & W. Ry. Co.* v. *Beavers*, 39 S.E. 82, 113 Ga. 398. And the courts of

Minnesota, Kansas and California also refuse to extend the doctrine beyond the particular class of cases to which the *Stout* case belongs. The Supreme Court of North Carolina, in the case of *Briscoe* v. *Henderson Lighting and Power Co.*, 148 N.C. 396, 62 S.E. 600, in a lengthy and able opinion by Justice Conner, after reviewing the authorities refused to extend the doctrine to a case where a boy thirteen years of age went upon the lands of the defendant company where the company maintained machinery which the complaint alleges was calculated to attract children and while there fell into a hot water well which the defendant negligently failed to keep properly covered and was injured. Justice Conner, while saying that the court did not absolutely repudiate the "turntable" cases in North Carolina so far as they applied to railroad turntables, as they were not involved in this case, at the same time repudiated the theory of implied invitation on which the "turntable" cases proceed, saying: "The inducement to one to enter on the premises of another which will render the latter liable for injuries from pitfalls thereon must be equivalent to an invitation, and mere permission is neither inducement, allurement, or enticement."

So that we find a great many of the courts utterly repudiating the doctrine and making injuries to infants stand on the same ground as those to adults, while those upholding the doctrine recognize its dangerous character by refusing to extend it beyond a certain class of cases. But if it be a good rule of law and properly applicable to one class of cases, why shouldn't it be a good rule of law in other cases involving the same basic principles whether the particular instrument of injury be a railroad turntable or a farmer's threshing machine? Or, if it is bad law in one case why shouldn't it be bad law in another case? Both involve the same fundamental principles. Isn't the threshing machine as peculiarly attractive to a child as the turntable and equally dangerous? Isn't a cherry tree full of ripe red fruit as capable of destruction to a child as a railway turntable? Neither can injure the infant without some

force set in motion by himself, in the one case the act of climbing, in the other, the act of getting upon the turntable. Is he any the less dead if he fall from the cherry tree and break his neck than if he have his life crushed out by the revolutions of the turntable? Yet the same courts that mulct a railroad company in damages for injury to a trespassing infant when he is injured by the company's necessary machinery lawfully used in lawful business refuse to extend the rule to the tree or the threshing machine and like cases. It may be answered that the cherry tree, though attractive, is neither inherently dangerous nor machinery.

Perhaps so, if we seek to find nice distinctions, but a threshing machine is both and the tree is certainly capable of dangerous use and it is equally true that a turntable is not dangerous to those who let it alone. What is good law in one case ought to be good law in another case, if both involve the same character of parties and the same basic principles. As said by the Supreme Court of Virginia in *Walker's Adm'r.* v. *The Potomac, F. & P. Ry. Co.*, 53 S.E. 113, 105 Va. 226. "For if it be a common law rule that a land owner, who is in the reasonable and lawful use of his property, makes changes thereon which have the double effect of inviting young children to the land, and at the same time exposing them to serious danger, is guilty of negligence, unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply not only to railroad companies and their turntables, but to all landowners, who, in the use of their land, maintain upon it dangerous machinery, or conditions which present a like attractiveness to children. The common law applies alike to all landowners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law which had its origin before there were either railroads or turntables, applies only to railroads in the use of their land upon which they have dangerous machinery."

But the common law does not make it the duty of a landowner to have his premises in safe condition for the uninvited

entry of trespassers, be they adults or infants, nor to take precautions to keep them off his premises or protect them after entry and in restricting the doctrine to turntables alone as so many of the courts upholding it do, they refuse to follow it to its natural and logical consequences. Inasmuch as there is no common law doctrine then permitting such a discrimination against railroads the courts in upholding such a doctrine are, in the absence of express statutory authority, exceeding their powers and are directly incroaching upon the peculiar province of their legislatures in violation of their constitutions. If such discrimination be necessary, the legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances and leave untouched the common law rights of the ordinary landed proprietor. The New Jersey Court in *Delaware, etc., Ry. Co.* v. *Reich,* 40 Atl. 682, says that the doctrine, if followed to its logical conclusion would require a similar rule to be applied to all landowners in respect to all structures, machinery or implements maintained by them, which presented a like attractiveness and furnished a like temptation to children. He who leaves his mowing machine, or dangerous agricultural implement in his fields would seem to be amenable to this duty.

There is no controversy that the legal principle is correct which requires a person to owe some duty to another before his negligence shall be the basis of a cause of action against him. The "turntable" cases all acknowledge that. The weakness of the *Stout* case lies in the fact that it sought to impress on railroad companies, and did so, liability for negligence in leaving the turntable unlocked before it had established any duty on the part of the company toward the plaintiff. In order for a plaintiff to recover in negligence cases, it must appear that the defendant owed him some duty which it failed to discharge; for where there is no duty there can be no negligence giving rise to a legal action, *Walker's Admir.* v. *Potomac, F. & P. Ry. Co.,* supra. If, then, the railroad owed Stout no duty what difference could it make whether the turntable was locked or not?

But the advocates of this doctrine say that the infantile mind is immature and incapable of weighing danger like an adult and that, therefore, an adult owes a greater degree of care to an infant than to another adult. The principle of law is true enough, but it is only applicable when the adult owes the child some duty already and the child is in a place where he has a lawful right to be and his danger is known, or ought to be known; then the law requires the adult to have greater regard for the immaturity of the infant and exercise greater care in dealing with him than he would be required to take in the case of another adult whom he would have a right to presume was in full possession of all his faculties and able to look out for himself. The apparent assumption is that all children are outcasts and that the law imposes upon landowners the duty to look out for them because there is no one else to do so. As a matter of fact most children have some one, either parents or legal guardians, who must look after them, and whose moral duty it is to keep them off of dangerous premises and away from dangerous places, and this moral duty is equal to the moral duty of landowners to fence them out. As was said by the Pennsylvania Court in *Gillespie* v. *McGowan,* 100 Pa. St. 144, this rule "would charge the duty of protection of children upon every member of the community except their parents." Who can say what is or is not attractive to the juvenile mind? "A child's will is the wind's will." Almost anything will attract some child. The pretty house, or the bright, red mowing machine, or the pond in the farmer's field. Must all these things be guarded for fear some child whose parents either negligently or wilfully permit him to roam at will, will be injured?

But they go further, and say that the placing of such articles where they are accessible to children is an implied invitation to them. In *Powers* v. *Harlow,* 53 Mich. 507, the court said: "If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken." On the same principle an owner has been held liable

for injury to a child, for leaving dangerous explosives accessible to children, as a single torpedo unguarded on a railroad track, *Harriman* v. *Railroad Co.*, 45 Ohio St. 11. This is known as the doctrine of constructive invitation, and the courts thus holding declare that if the person is allured or tempted by some act of a railroad company to enter upon its lands, he is not a trespasser, but is there by the invitation of the company, and therefore the rule as to trespassers does not apply, and the company owes him the same duty that it would owe any other invited guest." "The viciousness of the reasoning," said the Court of Appeals of New Jersey, in the case of *Delaware, etc., Ry. Co.* v. *Reich,* supra, in discussing this question "which fixes liability upon a landowner because the child is attracted, lies in the assumption that what operate as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is unwarranted." As said by Mr. Justice Holmes, "Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it or hold parties bound to contemplate infractions of property rights, because the temptation to unformed minds to infringe them might have been foreseen."

The Virginia court in repudiating this artificial reasoning, says in *Walker's Adm'r.* v. *Railway,* supra.: "No one believes that a landowner as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children, and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises." This doctrine of constructive invitation has been utterly rejected by the highest courts of New Hampshire, Massachusetts, New York, New Jersey, Rhode Island, Michigan, Virginia and West Virginia.

So that in the final analysis we find the tendency to be against the doctrine of the turntable cases, though respectable

courts still maintain it to some extent, and the tide of authority drifting away from the artificial reasoning resorted to by some courts in their endeavour to sustain a doctrine, which though undoubtedly humane in its results, frequently works greater hardships in its operation and application.—*Central Law Journal.*

WILL DISCOVERED AFTER SALE BY ADMINISTRATOR

The case of *Hewson* v. *Shelley*, which for three and a half days occupied the attention of Mr. Justice Astbury, is one of extraordinary interest for conveyancers. The owner of certain freehold property named Barley Wood was supposed to have died intestate, and his widow took out letters of administration to him. The debts, duties, and funeral and testamentary expenses having been all paid, the administratrix, under the Land Transfer Act 1897, sold Barley Wood. Part of the proceeds was invested so as to form a fund to answer the widow's dower, and the remainder was divided between three co-heiresses. On the death of the widow, a will of the supposed intestate was found, more than twelve years after his death, but less than twelve years after the sale. This will gave all the testator's property to his widow for life, and after her death gave Barley Wood to G. The executors named in the will were the widow, G., and another. It is elementary law that executors derive their title from the will and not from the probate. Consequently Barley Wood vested in the executors at the death of the supposed intestate, and they, after the letters had been revoked and probate granted, took proceedings against the purchaser on the ground that he had bought the property from a person who had no right to sell it to him. One of the most recent authorities on the subject is the case of *Ellis* v. *Ellis* (92 L. T. Rep. 727; (1905) 1 Ch. 613), where Mr. Justice Warrington expressed himself thus: "Unfortunately for the plaintiffs there was in existence a will by which an executor was appointed; that will was duly proved, and the administration was revoked. Under those circumstances, I think it is clear law that the grant of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed

administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them and no power of dealing with them." There is a curious distinction between such a case and a case where there is a will but no executors of it were appointed. In *Boxall* v. *Boxall* (51 L. T. Rep. 771; 27 Ch. Div. 220) Mr. Justice Kay upheld a sale of leaseholds by an administratrix, though a will was afterwards discovered which did not appoint executors. That learned judge referred to the old case of *Abram* v. *Cunningham* (2 Lev. 182), decided in the reign of Charles II., and said: "The report, like many reports of that time, has a short note of the judgment not containing any reasons. But the argument is given at some length, and in it reliance was placed chiefly on the fact that the concealed will had appointed executors, who therefore had a right of property vested in them before probate, and this, I gather, was the ground of the decision. No stress seems to have been laid upon the fraud committed in concealing the will; and, indeed, where the question was whether a third person should suffer who had acquired the property in good faith from an administrator apparently duly constituted, it would not be reasonable to visit him with the consequences of a concealment to which he was no party."

Although, where the will appoints executors, the grant of administration is spoken of as wholly void, certain acts of the administrator are protected. "It would seem, however, that, as between the rightful representative and a person to whom the executor or administrator, under a void probate or grant of letters, has aliened the effects of the deceased, the act of alienation, *if done in the due course of administration*, shall not be void." Thus in the case of *Graysbrook* v. *Fox* (Plowd. 275, Temp. Eliz.) "it was laid down by the court, that if the sale had been made to discharge funeral expenses or debts, which the executor or administrator was compellable to pay, the sale would have been indefeasible for ever" (Williams on Executors, 10th ed., p. 462). This is reasonable, as since the executor would have been obliged to pay the funeral and testamentary expenses and debts of the deceased, he must be taken to have adopted the acts of the administrator in paying them. There are also certain provisions of the Probate Act 1857 to be considered. Sec. 77 pro-

vides for all payments *bona fide* made to any executor or administrator under a revoked probate or administration, before revocation, being lawful discharges, and for all payments made by such executor or administrator "which the person to whom probate or administration shall be afterwards granted might have lawfully made" being good. Sec. 78 enacts that "all persons and corporations making or permitting to be made any payment or transfer *bona fide* upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this Act shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration." If it were not for some such provisions, no one could safely pay a debt due to the testator's estate to an administrator or executor, as the testator's will or a later one might at any time be discovered and proved, and the debt might have been paid to the wrong person.

In *The Goods of J. Wright* (68 L.T. Rep. 25; (1893) P. 21) an application was made to the Probate Division for a grant of administration until a will was found. The widow of the deceased had stated that he had made a will, but that it had been accidentally destroyed. It was believed that the widow was not in England. Mr. Justice Gorell Barnes (as he then was) said that a grant *ad colligenda* would not be sufficient, as there did not seem to be much chance of the will turning up, and a grant of administration was made until the original will or an authentic copy thereof should be brought into the registry, limited to dealing with and completing the sale of certain leasehold houses and giving a discharge for the purchase money thereof. Probably, the alleged will in that case was never discovered. Otherwise, there might have been a question whether the purchasers got a good title from the limited administrator. If the proceeds of sale were employed in due course of administration, they presumably would, and the order of the court expressly referring to the sale might in any case have protected them.

In *Hewson* v. *Shelley* it was argued that as under the Land Transfer Act 1897 an administrator can sell realty for the payment of debts, etc., and it is not the practice for purchasers to

inquire if there are debts, etc., in existence, the purchaser was protected, seeing that the proceeds might have been employed in the due course of administration. The learned judge, however, brushed these arguments aside, as well as those which dealt with the possible sale for the purpose of raising money owing to the widow for estate duty or an improvement charge paid by her, on the ground that as a matter of fact the land was not sold for any such purposes.

The sale in question, though in form by the administratrix, was in reality by the widow and co-heiresses, who had consented to the sale of the land which they supposed was theirs. His Lordship, though fully sensible of the hardship on the purchaser, had no alternative but to give judgment for recovery of the premises by the executors and for an account of rents and profits since the widow's death. The fund set apart to meet the dower was with the consent of the plaintiffs ordered to be paid to the purchaser in exchange for the title deeds.

It is difficult to see how, at any rate, a judge of first instance, in the present state of the authorities, could come to any other conclusion, but the question which will now trouble conveyancers is: Can they safely accept titles from legal personal representatives or from persons who claim through recent purchasers from them? A will, or a later will, or even a codicil may afterwards turn up, and if it appoints executors or fresh executors the title may be bad. Yet, if they refuse to complete, the court may, and presumably would, decree specific performance. Possibly a practice may grow up of purchasers requiring personal representatives to show that they are selling for payment of debts, etc., or of purchasers insuring at Lloyd's against the risk of such sales being set aside. Possibly, the Legislature, in its wisdom, may intervene and, in effect, guarantee the sale by executors or administrators if made before the probate is or letters are revoked. It is, of course, hard on the devisee if the property to which he is entitled under the will or codicil does not come to him, as it has been sold by the administrator or wrong executor, but then he is merely a volunter, an object of the testator's bounty, while the purchaser has actually paid good money for it and is so much the poorer. Both are innocent parties, but the purchaser is the more entitled to our sympathy.—*Law Times.*

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—SALVAGE — TOWAGE — ABANDONED VESSEL—DERELICT — CONDITIONS SUBSTITUTING SALVAGE FOR TOWAGE — QUANTUM MERUIT.

The Glenmorven (1913), P. 141. This was an admiralty case. The plaintiffs had contracted to tow the defendants' rudderless ship from Vigo to the Tyne, for £400 "no cure no pay, no claim to be made for salvage." Whilst the voyage was proceeding the master and crew abandoned the ship, and the tug, with other assistance, took her first to Falmouth and then on to the Tyne. In these circumstances, Evans, P.P.D., held that the abandonment of the ship by the master and crew put an end to the towage contract, which was to tow the vessel with the master and crew on board, and that thereafter the services were not performed under contract, but were in the nature of salvage for which the plaintiffs were entitled, plus a *quantum meruit* for their previous services.

COMPANY—WINDING-UP — DIRECTOR — SERVANTS — PREFERENTIAL CLAIMS FOR WAGES—ARTICLES OF ASSOCIATION — COMPANIES CONSOLIDATION ACT, 1908 (8 EDW. VII. c. 69), s. 209, SUB-S. 1 (*b*)—DOMINION COMPANIES ACT (R.S.C. c. 144), s. 70—ONTARIO COMPANIES ACT (2 GEO. V. c. 31), s. 172 (*b*).

In re Beeton Co. (1913), 2 Ch. 279. This was a winding-up matter in which certain parties claimed to be entitled to preferential claims for salary. Mrs. Roberts was a director of the company which was formed to carry on a weekly periodical, and by the articles of association it was provided that a director might hold any other office or place under the company in conjunction with the office of a director. Mrs. Roberts was appointed dress editor at a fixed salary per annum, and her duties occupied the whole of her time. Miss Hotchell was employed by the company at a fixed salary per annum to supply "fashion drawings" for the periodical, and the company had the first call on her services and her work occupied most of her time, but she occasionally did work for other publishers. Mrs. Peel

was employed at a fixed salary per annum to supply weekly articles and other information, but she also wrote for other publishers. Neville, J., in these circumstances, held that, having regard to the articles of association, Mrs. Roberts' office as director did not preclude her employment in any other capacity, and that she was a "clerk or servant" of the company and as such entitled to preferential payment under the Companies Act, 1908 s. 209, sub-s. 1 (*b*), (R.S.C. c. 144, s. 70, 2 Geo. V. c. 31, s. 172 (*b*) Ont.), but that Miss Hotchell and Mrs Peel were merely contributors to the periodical and were not "clerks or servants" within the meaning of the section, and were therefore not entitled to preferential payment.

PRACTICE—DISCOVERY — PLAINTIFF OF UNSOUND MIND — NEXT FRIEND—AFFIDAVIT OF DOCUMENTS—DISCOVERY.

In *Pink* v. *Sharwood* (1913), 2 Ch. 286, Eve, J., held that where an action is brought by a person of unsound mind by his next friend, there is no jurisdiction to order the next friend to file an affidavit of documents for the purpose of discovery, *Dyke* v. *Stephens* (1885), 30 Ch.D. 189, being followed, in preference to *Higginson* v. *Hall* (1879), 10 Ch.D. 235. A contrary conclusion was arrived at in Ontario: see *Travis* v. *Bell*, 8 P.R. 550.

TRADE MARK—APPLICATION FOR REGISTRATION—MARK NOT PRESENTLY INTENDED TO BE USED.

In re Neuchatel Asphalte Co. (1913), 2 Ch. 291. In this case an application to register a trade mark was successfully opposed in the following circumstances The applicants were owners of an asphalte deposit in Switzerland, they had contracted with the Val de Travers Co. to supply it with all the asphalte it required, and not to supply asphalte to any other person in the United Kingdom. They applied to be allowed to register a trade mark in England in connection with the asphalte sold by them. The Val de Travers Co. opposed the application on the ground that a trade mark can only be registered for the purpose of the designation of goods sold in the United Kingdom, and that the applicants had no right to sell asphalte until the year 1926 which was too remote a period to warrant the present registration of a trade mark, and Sargant, J., so held.

COMPANY—RECEIVER AND MANAGER—APPOINTMENT BY DEBENTURE HOLDERS — NOTICE OF PREFERENTIAL CLAIM — SUBSEQUENT PAYMENT OF UNPREFERRED CLAIMS—LIABILITY OF RECEIVER.

Woods v. *Winskill* (1913), 2 Ch. 303. In this case Astbury, J., decided that where a receiver and manager, appointed by debenture holders of a limited company, has notice of preferential claims, and thereafter pays claims of ordinary creditors in carrying on the business, he is liable to the preferred creditors for damages in tort in respect of the moneys so paid away. The same rule would apply to a receiver or manager appointed by the Court.

LANDLORD AND TENANT—DEMISE OF FIRST FLOOR OFFICE—RIGHT TO PLACE FLOWER BOXES ON WALL OUTSIDE OF OFFICE WINDOWS—TRESPASS—DEMISE OF OUTER WALL.

Hope v. *Cowan* (1913), 2 Ch. 312, is an instance of the trivial matters which sometimes give rise to law-suits. This was an action by landlords against their tenants for trespass in affixing flower boxes on the outside of the windows of the demised premises. The demised premises were an office on the first floor of a building. The tenants covenanted to keep the inside of the premises in good repair, and the plaintiffs, the lessors, covenanted to keep the external part of the premises in repair, and to permit the tenants to affix their trade signs, to be approved by the plaintiffs, on the outside of that portion of the building in their occupation, and subject to this latter covenant, the defendants covenanted, not without first obtaining the written consent of the plaintiffs, to attach or affix any sign, nameplate, or letters to the premises, and to remove all outside names and trade signs at the end of the tenancy and make good all damage caused to the outside walls of the building thereby. By the lease under which the plaintiffs held, they were bound to repair and maintain the walls of the buildings. The defendants, without the plaintiffs' consent affixed flower boxes on brackets to the outside windows of their office. Joyce, J., who tried the action, held that the general rule of law is that under a demise of one floor of a building, or of a part of a building bounded on any side by an outside wall, unless there be some reservation to the contrary, both sides of the outside wall pass by the demise, and that being so, he held (the alleged nuisance caused by the boxes, being refuted), that the defendants had not exceeded their rights, and the action was dismissed.

LIEN—GENERAL LIEN—GOODS IN COLD STORAGE—PLEDGE OF BILLS OF LADING—ENFORCEMENT OF LIEN AGAINST HOLDER OF BILLS OF LADING.

Jowitt v. *Union Cold Storage Co.* (1913), 3 K.B. 1. In this case, a company imported from Australia frozen meat, and for the purpose of financing the company the plaintiffs paid the price owing by the company to the persons from whom the meat was purchased, and reimbursed themselves out of the proceeds of bills of exchange accepted by the company and discounted by a bank. Bills of lading were deposited with the bank as security for the bills of exchange. On the arrival of the meat in England, the company, with the assent of the bank, placed the meat in the defendants' cold store, to be delivered to the bank's order against the bill of lading. The defendants' terms of storage (which were those usual in the trade) provided that the defendants should have a general lien on the meat for all charges accrued and accruing against the storer, or for any other money due from the owners of the goods. The company having failed to meet the bills of exchange, the plaintiffs paid the bank and received the bills of lading and demanded delivery of the meat from the defendants who claimed to hold the meat for charges due to them from the company for the storage of other goods. Scrutton, J., who tried the action decided that the goods having been lodged with the defendants with the assent of the bank on the terms of the defendants having a general lien, the defendants were entitled to enforce the general lien against the plaintiffs who had succeeded to the bank's rights.

PRINCIPAL AND SURETY—CO-JUDGMENT DEBTORS—TIME GIVEN TO ONE JUDGMENT DEBTOR—DISCHARGE OF SURETY—MERCANTILE LAW AMENDMENT ACT 1856 (19 & 20 VICT. C. 97) S. 5—(10 EDW. VII. C. 63, S. 3, ONT.).

In re A Debtor (1913), 3 K.B. 11. In this case an attempt was made to apply the rule of law that time given to a principal debtor without the consent of a surety, discharges the surety, to the case where time is so given after judgment against the principal and surety, but Phillimore and Horridge, JJ., on an appeal from a Registrar in Bankruptcy, held that after judgment, the rule did not apply, following *Jenkins* v. *Robertson*, 2 Drew. 351.

FOREIGN JUDGMENT—JUDGMENT OF COURT IN BRITISH INDIA—DECREE FOR DIVORCE AND DAMAGES AGAINST CO-RESPONDENT—CO-RESPONDENT DOMICILED IN ENGLAND—ACTION TO RECOVER UPON DECREE OF FOREIGN COURT FOR DAMAGES.

Phillips v. *Batho* (1913), 3 K.B. 25. The plaintiff in this case was a British subject domiciled in British India where he had obtained a decree for divorce and as ancillary thereto a judgment for damages against the defendant as co-respondent, who had been a resident in India where the alleged adultery took place, but who had left India and come to live in England. He was served with process by registered post in England, and he did not appear. The defendant contended that the decree had been made against him without jurisdiction, and could not be enforced against him in England; but Scrutton, J., who tried the action held that, under the Indian Divorce Act 1869, the Indian Court had jurisdiction, and that the defendant had been properly made a party and served with process and was bound by the judgment, and he held that the case constituted an additional case to those enumerated by the Court in *Emanuel* v. *Symon,* 1908, 1 K.B. 302, in which an English Court will enforce a foreign judgment; because this was a judgment affecting status concerning which English Courts were not competent to deal, because the Sovereign and His Legislatures have entrusted marriages made in India between Christians domiciled there and the consequences of interference with such marriages to the Courts of that country, which constituted a sufficient reason for enforcing the judgment against the defendant in England, although the learned Judge admits that the mere fact that no remedy can be given against a defendant in England, is not conclusive in favour of enforcing a foreign judgment.

PRACTICE—CERTIFICATE FOR SPECIAL JURY—"IMMEDIATELY AFTER VERDICT"—JURIES ACT, 1825 (6 GEO. IV. C. 50), S. 34—(9 EDW. VII. C. 34, S. 84, ONT.).

In *Barker* v. *Lewis* (1913), 3 K.B. 34, a simple point of practice is involved. The action was tried by a special jury and the Juries Act, 1825 (6 Geo. IV. c. 50), s. 34 (see 9 Edw. VII. c. 34, s. 84, Ont.), provides that the party who applies for a special jury shall only be entitled to costs as if the action were tried by a common jury "unless the Judge before whom the cause is tried, immediately after the verdict, certify under his hand, upon the

back of the record that the same was a cause proper to be tried by a special jury." The action was tried on the 27th January, 1913, but the certificate of the Judge was not given until 24th April following. The Court of Appeal (Cozens-Hardy, M.R., and Kennedy L.J.) held that this was not a sufficient compliance with the Act.

MOTOR CAR—OFFENCE—OWNER—REFUSAL TO GIVE INFORMATION AS TO DRIVER OF MOTOR CAR—OMISSION TO SPECIFY OFFENCE COMMITTED BY DRIVER—MOTOR CAR ACT, 1903 (3 EDW. VII. C. 36), S. 1 (3).

Ex p. Beecham (1913), 3 K.B. 45. The applicant in this case was the owner of a motor car who had been convicted under the Motor Car Act, 1903 (3 Edw. VII. c. 36), s. 1 (3), for refusing to give information as to the driver of the car by whom an offence had been committed. An objection was taken before the magistrate that the information did not specify what particular offence had been committed nor where it had been committed; but the objection was, as the Divisional Court (Bankes, and Lush, JJ.) held, properly overruled. There appears to be no such provision in the Ontario Act, 2 Geo. V. c. 48.

CRIMINAL LAW—SENTENCE—WHIPPING AUTHORISED OF OFFENDER WHOSE AGE DOES NOT EXCEED SIXTEEN YEARS — OFFENDER OVER SIXTEEN AT TIME OF CONVICTION.

The King v. *Cawthron* (1913), 3 K.B. 168. This was a curious case. The defendant had been convicted of an offence against a female child and had been sentenced to a year's imprisonment at hard labour. The statute under which the conviction was had provided "that in the case of an offender whose age does not exceed sixteen, the Court may instead of sentencing him to any term of imprisonment, order him to be whipped." The prisoner was under sixteen when the offence was committed but over sixteen when convicted. He applied to have the sentence changed to whipping; but the Court of Criminal Appeal (Darling, Rowlatt, and Atkin, JJ.) held that it could not be done, that the statute only authorized whipping of offenders who were under sixteen at the time of conviction.

ASSIGNMENT OF CHOSE IN ACTION — NOTICE OF ASSIGNMENT — SUFFICIENCY OF NOTICE TO DEBTOR—JUDICATURE ACT, 1873 (36-37 VICT. C. 66), S. 25 (6)—(1 GEO. V. C. 25, S. 45, ONT.).

Denney v. *Conklin* (1913), 3 K.B. 177. This was an action by assignees to recover a chose in action, and the question was whether a sufficient notice of the assignment had been given to the debtor under the Jud. Act, s. 25 (6)—(see 1 Geo. V. c. 25, s. 45, Ont.). The facts were that on 5th December, 1907, one Derham, who was entitled to the debt in question, made a deed of arrangement whereby he absolutely assigned to Denny and Gasquet, the trustees, all his personal property. On 8th April, 1908, the solicitors of the trustees wrote to the defendant saying that, "the trustees of the deed of arrangement dated the 5th December, 1907, and executed by Mr. Walter Derham, have instructed us to apply to you for an account shewing all dealings between yourself and Mr. Walter Derham. The reason of this application is that there appears from Mr. Derham's books to be a considerable debt due from you to him for money advanced." On 24th June, 1910, one Metcalfe was by deed appointed a new trustee of the deed of 5th December, 1907, in substitution for Gasquet, but no notice of this deed was given to the defendant. This action was brought by Denny, Gasquet and Metcalfe to recover a debt of £808 from the defendant, who contended that no sufficient notice had been given under the Jud. Act, s. 25 (6). But Atkin, J., who tried the action held that the above notice was a sufficient notice under the Act to entitle the plaintiffs to sue in their own names and he gave judgment in their favour.

REPORTS AND NOTES OF CASES.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, Leitch, JJ.] [13 D.L.R. 134.

BERNSTEIN *v.* LYNCH.

Automobiles—Responsibility of owner when car used by servant for his own business or pleasure.

The owner of an automobile is answerable at common law for its negligent operation by his chauffeur, where, instead of returning the car to the garage where it was kept, as it was his duty to do after having used the vehicle in the business of his employer, the chauffeur while using the car for purposes of his own and driving it in a reckless manner, caused the plaintiff to be knocked off a bicycle and injured as a result of the chauffeur's negligent conduct.

Campbell v. *Pugsley*, 7 D.L.R. 177, specially referred to; *Burns* v. *Poulsom*, L.R. 8 C.P. 563, 567, followed; and see 1 Beven on Negligence, 3rd ed., 583.

Under sec. 19 of the Motor Vehicles Act, 2 Geo. V. (Ont.) ch. 48, R.S.O. 1914, ch. 207, the owner of an automobile is liable for any violation of the provisions of the Act by his chauffeur while using the car for purposes of his own without the knowledge or consent of his employer.

Campbell v. *Pugsley*, 7 D.L.R. 177, specially referred to; *Mattei* v. *Gillies*, 16 O.L.R. 558; *Verral* v. *Dominion Automobile Co.*, 24 O.L.R. 551, followed.

W. E. Raney, K.C., for defendant. *John MacGregor*, for plaintiff.

Province of Quebec.

COURT OF REVIEW.

Sir Charles P. Davidson, C.J., Tellier, and DeLorimier, JJ.] [13 D.L.R. 49.

BRIDGER *v.* ROBB ENGINEERING CO.

Negligence—Dangerous premises—Building in course of construction—Duty to licensee.

A person seeking employment on the construction work of a new building and entering on the works under the permission to be implied from a notice reading "labourers wanted" is a licensee while waiting for the arrival of the foreman in charge of the hiring of labourers; and is entitled as against the various contractors to such reasonable protection from unseen dangerous conditions in the premises as is incident to a building in course of construction.

Valiquette v. *Fraser*, 39 Can. S.C.R. 1, referred to.

W. F. Ritchie, K.C., for plaintiff. *W. L. Bond*, K.C., for Meldrum Bros. *A. H. Duff*, for Robb Engineering Co. *G. A. Mann*, K.C., for McGuire & Co. *F. Callaghan*, for Gelin.

Province of Nova Scotia.

SUPREME COURT.

Full Court.] HIRTLE *v.* KNOX. [13 D.L.R. 21.

Malicious prosecution—Probable cause—Criminal prosecution.

Probable cause exists for laying information for theft against one who forcibly took a crop from a purchaser which was planted by the former after the extinguishment of his rights in the land by a sale by the sheriff under an execution, where the taking was by force and accompanied by trespass to lands, although under a pretended claim of right.

Paton, K.C., for appellant. *McLean*, K.C., for respondent.

Province of New Brunswick.

SUPREME COURT.

Full Court.] KEYES *v.* HANINGTON. [13 D.L.R. 139.

Corporations and companies—Preferences—Loan to liquidator—Order of Court—Priority over costs of winding-up.

A claim for money lent the liquidator of a company under an order of a Court declaring that the loan should be a first charge on all the assets of the company, subject only to existing liens, charges or encumbrances, is entitled to priority over the costs and charges of the winding-up proceeding, including liquidator's and solicitor's fees; and such rule is not affected by sec. 92 of the Winding-up Act, R.S.C. 1906, ch. 144, providing that the costs, charges and expenses properly incurred in a winding-up proceeding, including remuneration of the liquidator, shall be payable from the assets in priority to all other claims; since such section applies only to confer priority over claims against the company in existence at the time of going into liquidation.

M. G. Teed, K.C., for appellant. *A. J. Gregory*, K.C., for respondents.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] WALLACE *v.* LINDSAY (No. 2). [13 D.L.R. 8.

Judgment—Modification—Presumption—New judgment.

Where an action was dismissed as to all but one defendant, against whom judgment was rendered, it will be presumed that a subsequent ex parte entry on the records of a County Court of a "trial and judgment for the plaintiff" for a larger sum was merely a correction of the first judgment as to the one defendant only, and that it was not intended as a judgment on a new trial against all of the defendants.

Wallace v. *Lindsay*, 9 D.L.R. 625, reversed.

A. C. Campbell, for plaintiff. *J. E. Adamson*, and *C. A. Adamson*, for defendant.

KING'S BENCH.

Galt, J.] COMPLIN *v.* BEGGS. [13 D.L.R. 27.

Brokers—Real estate—Duty to obtain highest price—Principal and agent — Compensation — Breach of duty — Fraud of principal.

Where the prices of large acreages of farm lands are fixed approximately on well-understood standards, the owner who in the usual course employs a selling agent and names the selling price, either adding the agent's commission to that price or allowing the agent to retain whatever amount he can secure from a purchaser over and above the price named, cannot invoke the ordinary rule which imposes upon an agent the duty of obtaining the highest possible price for his principal.

Morgan v. *Elford*, 4 Ch. D. 352, applied.

Upon a contract by a real estate agent to sell lands for his principal, the obligation of the latter to treat the agent honestly and to do nothing calculated to deprive him unfairly of his commission is as strict as that of the agent to act honestly and to refrain from accepting (under ordinary circumstances) any commission or other benefit from the purchaser.

Upon an agency contract to sell lands a breach of duty by the agent which is not tainted by dishonesty but is merely the result of a mistaken notion of his rights will not disentitle him to commission, although he is liable to his principal for any profits illegally received.

Hippisley v. *Knee Bros.*, [1905] 1 K.B. 1, applied; *Andrews* v. *Ramsay*, [1903] 2 K.B. 635, distinguished; *Manitoba and N.W. Land Corporation* v. *Davidson*, 34 S.C.R. 255, considered.

The land owner who listed his property for sale with a real estate agent is under a legal obligation to do nothing calculated to deprive the agent unfairly of his commission. (Dictum *per* Galt, J.)

P. J. Montague, for plaintiffs. *O. H. Clark*, K.C., for defendants.

Province of British Columbia

COURT OF APPEAL.

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [12 D.L.R. 683.

PICARD *v.* REVELSTOKE SAW MILL CO.

Company—Powers of managing director—Sale of business.

The managing director of a company who has authority to manage and conduct its business, does not have implied authority to sell the entire assets of the company as a going concern, since such a sale does not relate to the carrying on of its business.

Picard v. *Revelstoke Saw Mill Co.*, 9 D.L.R. 580, varied.

The managing director of a company is answerable in damages to an optionee, where, without authority, he gave an option for the sale of the assets of the company, leading the optionee to believe that he was empowered to do so.

Bodwell, K.C., and *J. M. Macdonald*, for plaintiff, appellant. *S. S. Taylor*, K.C., and *Carter, for* defendants, respondents.

Full Court.] SLATER *v.* VANCOUVER POWER CO. [13 D.L.R. 143.

Master and servant—Liability for injury to servant—Safe place —Pole set in hole made by contractor other than defendant —Common employment.

One who contracts to string wires on poles to be set by him in holes dug by another contractor, which were accepted as being sufficiently deep, is answerable for the death of a servant as the result of the fall of a pole on which he was working that was set in a hole not deep enough to hold it securely, since there was a failure to furnish a safe place in which to work.

The defence of common employment is not applicable where a servant's injury is due to the breach of the master's duty to provide a safe place in which to work.

Ainslie Mining, etc., Co. v. *McDougall*, 42 Can. S.C.R. 420, followed.

D. G. Macdonell, for plaintiff, respondent. *W. B. A. Ritchie*, K.C., and *Mather*, for defendants, appellants.

Full Court.] [13 D.L.R. 152.

LEWIS *v.* GRAND TRUNK PACIFIC RY. CO.

Master and servant—Workmen's Compensation Act—Arbitrator —Submitting questions to judge.

After an award of an arbitrator appointed under the Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, has been reduced to writing and published, he cannot submit questions under sec. 4 of the Act, to a judge of the Supreme Court.

A. Alexander, for plaintiff, respondent. *D. E. McTaggart,* for defendant, appellant.

Macdonald, C.J.A., Irving, and Galliher, JJ.A.] [13 D.L.R. 176.

WINTER *v.* GAULT BROS., LTD.

Chattel mortgage—Validity—Consideration—Bill of sale as security—Affidavit of bona fides—Priorities—After-acquired goods.

Notwithstanding the bona fides of the transaction, a bill of sale given as security to one creditor for an advance made in paying off another creditor will be void as against the creditors generally of the grantor unless the affidavit of bona fides contains a clause that the grantor is justly and truly indebted to the grantee in the sum secured.

A chattel mortgagee who sets up against the mortgagor's assignee for creditors a claim to part of teh mortgagor's stock-in-trade as after-acquired goods, which by the terms of the mortgage were covered thereby, and who pleads that the registration statute does not apply to after-acquired property has the onus cast upon him of proving what part, if any, of the goods which he had seized under the mortgage of which the registration was defective, were in fact after-acquired goods and of segregating them from others not of that character.

Sir C. H. Tupper, for appellant, defendant. *M. A. Macdonald,* for respondent, plaintiff.

ANNOTATION ON THE ABOVE CASE.

At common law an assignment was not good, so far as it professed to convey after-acquired property; it could only operate upon such property as was in existence, and which was the grantor's at the time of the assignment, or in which he had some interest, unless, however, the grantor ratify

the sale of the "after-acquired property" by some act done by him after the property is acquired by him; and an assignee acquired no valid title by such instrument to such property when there was no *novus actus: Lunn* v. *Thornton*, 1 C.B. 379, 14 L.J.C.P. 161.

But if a seller or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree specific performance. If it be so, then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract: Lord Westbury in *Holroyd* v. *Marshall*, 10 H.L.C. 191; *Coyne* v. *Lee*, 14 O.A.R. 503, 23 C.L.J. 413; *Tailby* v. *Official Receiver* (1888), 13 A.C. 523; *Lazarus* v. *Andrade*, 5 C.P.D. 319; *Leatham* v. *Amor*, 47 L.J.Q.B. 581; *Re Panama, etc., Mail Co.*, L.R. 5 Ch. 318.

On a contract or bill of sale purporting to assign goods to be acquired in the future, if the goods be sufficiently described to be identified on acquisition by the seller, the equitable interest in them passes to the buyer as soon as they are acquired (*Tailby* v. *Official Receiver* (1888), 13 A.C. 523; *Holroyd* v. *Marshall*, 10 H.L.C. 191; *McAllister* v. *Forsyth*, 12 Can. S.C.R. 1; *A. E. Thomas, Limited* v. *Standard Bank of Canada*, 1 O.W.N. 379; *Fraser* v. *Macpherson*, 34 N.B.R. 417 (affirmed by Supreme Court of Canada)), and if not so described the property will not pass until the seller does some act appropriating them to the contract (*Langton* v. *Higgins* (1859), 28 L.J. Ex. 252), or unless the buyer takes possession of them under an authority to seize: *Hope* v. *Hayley* (1856), 25 L.J.Q.B. 155.

If the mortgage covers future acquired stock, and there is, under the terms of the mortgage, an implied license to the mortgagor to carry on his business and sell the stock, the *bonâ fide* purchasers from the mortgagor will get a good title, notwithstanding that the mortgage was duly registered, and especially when the mortgage provides that until default the mortgagor shall be entitled to make use of the stock without hindrance or disturbance by the mortgagee; but if the mortgagor fraudulently sells the goods to *bonâ fide* purchasers not in the ordinary course of business, the mortgagee will be entitled thereto, because the right of the mortgagor to deal with the goods is subject to the implied condition that the dealing shall be in the ordinary course of business (*National Mercantile Bank* v. *Hampson*, 5 Q.B.D. 177; *Walker* v. *Clay*, 49 L.J.C.P. 560; *Dedrick* v. *Ashdown*, 15 Can. S.C.R. 227, 242); but the goods to be afterwards acquired must be in some way specifically described, for goods which are wholly undetermined, as, for instance, "all my future personalty," will not pass as future-acquired property: *Tadman* v. *D'Epineuil*, 20 Ch. D. 758; *Lazarus* v. *Andrade*, 5 C.P.D. 318; *Belding* v. *Read*, 3 H. & C. 955.

A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained *bonâ fide* and without notice: *Whynot* v. *McGinty*, 7 D.L.R. 618, referring to *Holroyd* v. *Marshall*, 10 H.L.C. 191; *Reeves* v. *Barlow*, 12 Q.B.D. 436; see *Imperial Brewers* v. *Gelin*, 18 Man. L.R. 283.

And, where a mortgage is made upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time: *Imperial Paper Mills* v. *Quebec Bank*, 6 D.L.R. 475, 26 O.L.R. 637.

Where a chattel mortgage conveys the stock-in-trade, shop, contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to those already there, as fully and to all intents and purposes as if the said added or substituted stock were already in said shop and particularly mentioned"; such provision to cover other or after-acquired property is aimed at the "stock-in-trade" and requires clear words in order to cover other property sought to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated: *Dominion Register Co.* v. *Hall & Fairweather*, 8 D.L.R. 577; *Moore* v. *Magrath*, 1 Cowper 9.

Where a mortgage not specifically mentioning present or future book debts covers the "undertaking . . . together with . . . incomes and sources of money, rights, privileges . . . held or enjoyed by (the mortgagor) now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on present and future book debts of the trading corporation by which the mortgage was made: *National Trust Co.* v. *Trusts and Guarantee Co.*, 5 D.L.R. 459, 26 O.L.R. 279.

An assignment of a man's stock-in-trade and effects on the farm, together with all the growing crops, and other crops, "which at any time thereafter should be in or about the same," will be a sufficiently specific description of the future crops in the farm to make the assignment a valid one in equity: *Clements* v. *Matthews*, 11 Q.B.D. 808.

A mere power to seize future chattels does not operate in equity as an assignment of such future chattels, nor give the assignee a present interest in them: *Reeve* v. *Whitmore*, 4 DeG. J. & S. 1; *Cole* v. *Kernot; Thompson* v. *Cohen*, L.R. 7 Q.B. 527; *Holroyd* v. *Marshall*, 10 H.L. Cas. 191.

Substituted, or added stock-in-trade should be specifically mentioned if it is to be covered and the premises whereon the goods were or were to be brought should be specifically described: *Kitching* v. *Hicks*, 6 O.R. 739, 20 C.L.J. 112; *Thomas* v. *Standard Bank*, 1 O.W.N. 379, 548; *Thomas* v. *Kelly*, 13 A.C. 506.

Although a contract which purports to transfer property which is not in existence, does not, in equity, operate as an immediate alienation; still if a vendor or mortgagor agrees to sell or mortgage specific property of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of equity will, in this case, compel him to perform his contract; and the contract will, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired: *Re Thirkell, Perrin* v. *Wood* (1874), 21 Gr. 492 at 509.

If the instrument contains so far as all the goods referred to are concerned, such a description as that a person desiring to deal with these goods and chattels, or the sheriff seeking to enforce an execution against the mortgagor, could, without any doubt or difficulty, satisfy himself on the point whether there were any, and if so, what, goods not covered by the instrument in question; and this should be the test of the sufficiency or insufficiency of a description which covers a stock-in-trade with after-acquired goods replenishing the stock: *Re Thirkell, Perrin* v. *Wood* (1874), 21 Gr. 492.

An attempt has been made to draw a distinction between substituted property and after-acquired property, as to the completeness of description, but it is doubtful if such a contention is tenable: *Chidell* v. *Galsworthy*, 6 C.B.N.S. 471.

An instrument describing after-acquired personalty in the words "all his present and future personalty," will only suffice to charge in favour of the vendee, as between the parties, all the personal property at the date of the instrument, but will not operate so as to charge after-acquired property; such a description does not confine the assignment to specific goods, but to undetermined property: *Tadman* v. *D'Epineuil*, 20 Ch. D. 758. And though after-acquired property is properly and specifically described, yet inasmuch as the assignment thereof, though absolute in form, amounts to a contract to assign, for the breach of which the assignor incurs a liability provable in bankruptcy, and from which he is released by his discharge, such description will not cover goods brought on the premises after the discharge in bankruptcy has been granted: *Collyer* v. *Isaacs*, 19 Ch. D. 342.

In *Springer* v. *Graveley*, 34 C.L.J. 135, it was held, that although there is a sufficient interest in the increase of mortgaged cattle in favour of the mortgagor to give title to them free from the mortgage to a *bonâ fide* purchaser, an execution creditor is not in the same position, and can only take the legal title charged with the mortgage. The case was affirmed *sub nomine Graveley* v. *Springer*, 3 Terr. L.R. 120, 2 N.W.T. 306.

Where a chattel mortgage conveyed the stock-in-trade of the mortgagor, and "all goods which at any time may be owned by the mortgagor and kept in the said store for sale, and whether now in stock or hereafter to be purchased and placed in stock," it was held that after-acquired stock

brought into the business in the ordinary course thereof became subject to the chattel mortgage as against execution creditors of the mortgagor, notwithstanding that their writs were in the hands of the sheriff at the time such stock was brought into the business; the equitable right of the mortgagee attaching immediately on the goods reaching the premises: *Coyne* v. *Lee*, 14 A.R. (Ont.) 503.

A provision in a chattel mortgage that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the mortgagors or used in connection with their business during the currency of the mortgage operates as a valid lien and charge upon all the after-acquired goods brought upon the premises: *Imperial Brewers* v. *Gelin*, 18 Man. L.R. 283.

A description of after-acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishing, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business," is sufficient, and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage: *Horsfall* v. *Boisseau*, 21 O.A.R. 663.

A provision covering after-acquired property of the business of manufacturing cannot be extended to the goods in a mercantile business, and *vice versa*: *Milligan* v. *Sutherland*, 27 O.R. 235, 238.

A mortgage of an electro-plating factory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage: *McCosh* v. *Barton*, 2 O.L.R. 77, reversing 1 O.L.R. 229.

In a chattel mortgage the goods were described as follows: "All of which said goods and chattels are now the property of the said mortgagor and are situated in and upon the premises of the London Machine Tool Co. (describing the premises) on the north side of King street, in the city of London," and in an attached schedule was this description: "And all machines in course of construction, or which shall hereafter be in course of construction, or completed, while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor, or which are now or shall be in any other premises in the city of London." It was held that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and, if it could, the description was not sufficient within the meaning of Bills of Sale Act (R.S.O. 1887, ch. 25) to cover machines so manufactured: *Williams* v. *Leonard*, 26 Can. S.C.R. 406.

Province of Alberta.

SUPREME COURT.

Harvey, C.J.] REX *v.* PELKEY. [12 D.L.R. 780.

Prize fighting—What constitutes—Prize or reward—Homicide.

An encounter of the nature of a fight, with fists or hands, between two persons who have met for such purpose by previous arrangement is a "prize fight" under Cr. Code, 1906, s. 105, within the statutory definition of the phrase "prize fight" contained in Cr. Code, 1906, s. 2 (31), if the contest be one in which each strives to overcome or conquer the other, although there is no prize offered to the victor.

R. v. *Wildfong*, 17 Can. Cr. Cas. 251; *R.* v. *Fitzgerald*, 19 Can. Cr. Sas. 145; and *Steele* v. *Maber*, 6 Can. Cr. Cas. 446, referred to.

On a trial for manslaughter against one of the contestants in a so-called boxing contest in respect of the death of the other contestant in the ring following a knock-out blow, the jury in considering whether the contest was one prohibited by the provisions of the Criminal Code as to prize fights, may take into consideration the weight of the gloves as bearing on the intention that the fight should terminate by one or the other being incapacitated, although limited to ten rounds.

James Short, K.C., for the Crown. *A. L. Smith*, for Pelkey.

ANNOTATION ON THE ABOVE CASE.

The present sections of the Criminal Code of 1906, relating to "Prize fights" have their origin in the Statutes of Canada, 44 Vict. ch. 30, being "An Act respecting prize fights." This Act was consolidated in the Revised Statutes of Canada of 1886 as ch. 153 of same. A reference to the original statute may be of assistance in ascertaining the meaning of secs. 104 to 108 inclusive of the Criminal Code 1906, those being the sections bearing the sub-title "Prize fights." The case of *R.* v. *Pelkey*, above reported, contains a dictum *per* Harvey, C.J., that the presence or absence of a prize which is suggested by the name of the offence has no significance whatever and as there is nothing suggesting a prize in the statutory definition the offence may be complete as a "prize fight," although there be no prize or the handing over or transfer of money or property on the result. A similar dictum is contained in the case of *R.* v. *Wildfong*, 17 Can. Cr. Cas. 217, decided by Judge Snider, of Hamilton, in 1911. The point cannot be said to have been actually essential to the result in either of these two

cases, and while the opinions expressed as to the effect on the offence where there is no prize, are of importance because of the high judicial standing of the two Judges named, they do not appear to be authoritative as precedents by reason of the fact that this question did not come up squarely for decision and both cases went off on other grounds.

In the "Act respecting prize fighting," R.S.C. 1886, ch. 153, the interpretation clause declared that, unless the context otherwise required, the expression "prize fight" means an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them. The Act provided the punishment for challenging to fight a prize fight, and such offence was declared to be a misdemeanour and punishable on summary conviction. Engaging as a principal in a "prize fight," or aiding or abetting a "prize fight," were likewise misdemeanours and were punishable on summary conviction. Special duties to prevent "prize fights" were imposed upon sheriffs and police officers in like manner as such duties are now stated in secs. 627 and 628 of the Criminal Code, 1906. Judges of the Superior and County Courts were given all the powers of justices of the peace as regards offences under the Prize Fighting Act, and such powers they still have by virtue of sec. 606 of the Criminal Code, 1906, which replaces in part sec. 10 of the original statute, 44 Vict. ch. 30. Section 9 of that Act which was the predecessor of the present sec. 108 of the Criminal Code, 1906, was as follows:—

"9. If, after hearing evidence of the circumstances connected with the origin of the fight or intended fight, the person before whom a complaint is made under this Act is satisfied that such fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals engaged or intended to engage therein, and that the same was *not an encounter or fight for a prize* or on the result of which the handing over or transfer of money or property depends, such person may, in his discretion discharge the accused or impose upon him a penalty not exceeding fifty dollars."

While section 108 was not directly invoked in the principal case above reported it is of importance for the interpretation of the term "prize fight" in the preceding secs. 104 to 107 inclusive, having regard to the statutory definition of "prize fight" as contained in sub-sec. 31 of sec. 2 of the Criminal Code, 1906. Sub-sec. 31 appears in the same terms as the definition in the original Act, when read with the limitation which is imposed by sec. 2 as regards all of the statutory definitions, namely, that the interpretation shall be as stated "unless the context otherwise requires."

This sec. 9 had a marginal note as follows: "If the fight was not a prize fight but an actual quarrel."

With reference to the meaning of statutory interpretation clauses generally, the following extract from Beal's Cardinal Rules of Legal Interpretation, 2nd ed., 299, is of interest: "An interpretation clause should be used for the purpose of interpreting words which are ambiguous or equivocal, and not so as to disturb the meaning of such as are plain. An

interpretation clause should be taken as declaring what may be comprehended within the term where the subject matter and circumstances require that it should be so comprehended."

In support of these propositions the following authorities are referred to:—

"An interpretation clause is . . . not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should": *Reg.* v. *Cambridgeshire* (1838), 7 A. & E. 480, at 491, Lord Denman, C.J.

"With regard to all these interpretation clauses, I understand them to define the meaning, supposing there is nothing else in the Act which is opposed to the particular interpretation. When a concise term is used, which is to include many other subjects besides the actual thing designated by the word, it must always be used with due regard to the true, proper and legitimate construction of the Act": *Midland R. Co.* v. *Ambergate, Nottingham and Boston and Eastern Junction R. Co.* (1853), 10 Hare 359, at 369, Turner, V.-C.

With regard to the statutory definition it is submitted that, notwithstanding its terms, a prize is still essential to the offence of engaging or participating in a prize fight; and that this interpretation is assisted by the wording of sec. 108 of the Criminal Code, 1906, and the marginal note to same which reads as follows: "When fight is not a prize fight."

That the statutory definition does not cover all of the ingredients of the offence is shewn by the principal case in which Harvey, C.J., reviews the authorities on the point and concludes that the encounter or fight aimed at by the statute must necessarily be an encounter by way of fight in which each strives to overcome or conquer the other; in other words, that the fight must be one in which each of the parties is to fight until he can no longer stand up to continue the combat. It will be noted that in sec. 108 the term used is "fight," not "prize fight," and that the marginal note emphasizes this by its wording, "when fight is not a prize fight." Reading sec. 108 along with the other sections it is submitted that the offence for which sec. 108 provides is not any of the offences specified in secs. 104 to 107 inclusive, but a lesser offence in which there is no prize, either to the successful contestant or to any one else; in other words, that the fight was not for a prize or to influence the depending result in which the handing over or transfer of money or property was at stake.

This lesser offence would in most cases be developed upon a prosecution for the greater offence of "prize fighting." If there need be no prize or handing over of money or money's worth to constitute a prize fight, and if sec. 108 be read as applicable to the same offence as that to which the preceding sections relate, how is it to appear that the fight was not for a prize? If the question of prize or no prize has been eliminated from the offence of prize fighting by virtue of the statutory definition in Code sec. 2, sub-sec. 31, there would be no need for the prosecution to shew either

that there was a prize or that there was not. Can it be that the onus of proving that there was no prize is upon the accused? And is it to be left to the accused in the event of there being no prize to also shew that the fight was *bonâ fide* the result of a quarrel or dispute? While evidence as to the latter might not be essential to the principal or greater offence of prize fighting, it is probably admissible in mitigation; but different considerations as to the admissibility of evidence would apply as to proving that the fight was not for a prize, if a prize be not requisite to the offence of participating in a prize fight. It does not seem reasonable that the accused should be forced to give that evidence in order to get the benefit of sec. 108. Clear words should appear where it is intended by a statute to make it an offence to fight to a finish without a prize, where prior to the statute the striving for a prize was an essential; and it might also be expected that more precise terms than are to be found in sec. 108 would be necessary to displace the onus of proof ordinarily laid upon the prosecution.

Reading together all of the sections above referred to it seems more probable that sec. 105 requires that the "prize fight" engaged in must be a fight in which (1) each strives to overcome or conquer the other, (2) there was a prize, which might consist of a reward to one or both contestants or might consist of what is termed the "gate receipts" or a prize in the sense that the transfer of money or property depended on the result of the fight undertaken with such transfer in view by the contestant who is charged, and (3) that the fight was pre-arranged.

It is submitted further that the offence under sec. 108 is a lesser offence in which there are the same elements as the offence of "prize fighting" except that the prize is lacking, and that in default of satisfactory proof by the prosecution that there was a prize in the sense above indicated, the prosecution has the alternative of offering evidence that the fight or intended fight was *bonâ fide* the consequence or result of a quarrel or dispute between the principals, and the magistrate may thereupon impose the lesser penalty of a fine not exceeding $50, or may in his discretion discharge the accused. Then, if there were no prize and no quarrel or dispute there would be no offence and the accused would have to be discharged unless the fighting were in public so as to cause public alarm and so constitute an affray, as to which see sec. 100 of the Criminal Code, 1906.

If one consents to be beaten, the person who inflicts the battery is not ordinarily chargeable with an offence; the limit to this doctrine being, that the beating must be one to which the party has the right to consent: *Pillow* v. *Bushnell*, 5 Barb. 156. No concurrence of wills can justify a public tumult and alarm; and so persons who voluntarily engage in a prize fight, and their abettors, are all guilty of an assault: *Rex* v. *Perkins*, 4 Car. & P. 537. And see *Rex* v. *Billingham*, 2 Car. & P. 234; *Reg.* v. *Brown*, Car. & M. 314. But see *Duncan* v. *Commonwealth*, 6 Dana 295.

Sparring with gloves is not dangerous or likely to kill, and a death caused by such sparring is not manslaughter, unless continued to such an extent that the parties are exhausted so that a dangerous fall, causing death, is likely to result from its continuance: *R.* v. *Young*, 10 Cox C.C.

371. And the question whether such a contest is merely a sparring exhibition or a prize fight, within the meaning of statutes condemning prize fights as misdemeanours, is one of fact for the jury in a prosecution for a resulting homicide: *People* v. *Fitzsimmons*, 69 N.Y.S.R. 191, 34 N.Y. Supp. 1102.

In *R.* v. *Coney*, 8 Q.B.D. 534, two men fought with each other in a ring formed by ropes supported by posts and in the presence of a large crowd. Amongst the crowd were the prisoners, who were not proved to have taken any active part in the management of the fight, or to have said or done anything. They were tried and convicted of aiding and abetting an assault. Upon a case reserved the conviction was quashed by eight Judges against three, the majority holding that mere voluntary presence at a fight does not as a matter of law necessarily render persons so present guilty of aiding and abetting an assault, although the mere presence unexplained may, it would seem, afford some evidence for the consideration of a jury: *R.* v. *Coney*, 8 Q.B.D. 534, *per* Denman, J., Huddlestone, B., Manisty, Hawkins, Lopes, Stephen, Cave and North, JJ. (Coleridge, C.J., Pollock, B., and Mathew, J., *diss.*). This decision appears to overrule *R.* v. *Murphy*, 6 C. & P. 103; *R.* v. *Perkins*, 4 C. & P. 537; and *R.* v. *Billingham*, 2 C. & P. 234, if and so far as they decided that mere presence at a prize fight is encouragement. Cf. *R.* v. *Young*, 8 C. & P. 644, where mere presence at a duel was held not enough to warrant conviction for aiding and abetting in the murder of one of the combatants.

In *R.* v. *Young*, 10 Cox 371, seven men were indicted for manslaughter. They had been sparring with gloves on, and the deceased was with them. After several rounds the deceased fell and struck his head against a post, whilst he was sparring with the prisoner. The men were all friendly, but as the deceased and the prisoner came up to the last round they were "all in a stumble together." The medical testimony was to the effect that sparring might be dangerous, but that death would be unlikely to result from such blows as had been given. The danger would be where a person was able to strike a straight blow, but the danger would be lessened as the combatants got weakened. Bramwell, B., said, the difficulty was to see what there was unlawful in this matter. It took place in a private room; there was no breach of the peace. No doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter; because a fight was a dangerous thing and likely to kill; but the medical witness here had stated, that this sparring with the gloves was not dangerous, and not a likely thing to kill. After consulting Byles, J., Bramwell, B., said, that he retained the opinion he had previously expressed. It had, however, occurred to him that supposing there was no danger in the original encounter, the men fought on until they were in such a state of exhaustion that it was probable they would fall, and fall dangerously, and if death ensued from that, it might amount to manslaughter, and he proposed, therefore, so to leave the case to the jury and reserve the point if necessary. The prisoners were acquitted.

In *R.* v. *Orton*, 14 Cox 226 (C.C.R.), it was held upon a case reserved

that if persons meet to fight intending to continue till they give in from injury or exhaustion, the fight is unlawful whether gloves are or are not used.

An exhibition of fighting with fists or hands, to witness which an admission fee is charged to the public and at which it is announced that the stake money will go to the contestant who knocks out his opponent in a stipulated number of rounds is a "prize fight" within the Criminal Code: *Steele* v. *Maber*, 6 Can. Cr. Cas. 446.

But a sparring match with gloves under Queensbury or similar rules given merely as an exhibition of skill and without any intention to fight until one is incapacitated by injury or exhaustion, is not a "prize fight": *The King* v. *Littlejohn*, 8 Can. Cr. Cas. 212.

A sparring or boxing match for a given number of rounds which would not ordinarily exhaust either participant, is not a "prize fight," although the boxers were paid fixed sums, not depending upon the result, for giving the exhibition: *The King* v. *Fitzgerald*, 19 Can. Cr. Cas. 145.

Beck, J.] RE BAYLIS INFANTS. [13 D.L.R. 150.

Infants—Parents' right to custody—Welfare of child to govern.

In determining whether the father or mother, who are living apart, shall have the custody of a minor child, the wishes of the mother are to be considered, as well as the wishes of the father, but the primary consideration is the welfare of the child.

In awarding the custody of infants to their mother as against the father, the order should provide that the latter shall have reasonable access to them.

H. A. Mackie, for applicant. *A. F. Ewing,* for mother.

Province of Saskatchewan.

SUPREME COURT.

Haultain, C.J., Johnstone, Lamont, and Brown, JJ.] [13 D.L.R. 182.

RURAL MUNICIPALITY OF VERMILLION HILLS *v.* SMITH (No. 2).

Taxes—Action for collection—Who may maintain—Rural municipality—Taxes assessed by local improvement district.

A rural municipality that succeeds a local improvement district, may, in the name of its council, recoved unpaid land taxes

assessed before the organization of the rural municipality by the local improvement district under the provisions of ch. 36, Sask. Statutes of 1906, and ch. 88, R.S.S. 1909, as well as the Supplementary Revenue Act, ch. 37, R.S.S. 1909.

Appeal—Amendments—Action in name of municipality—Substitution of council.

Where an action to recover taxes is improperly begun in the name of the municipality instead of its council an amendment will be allowed on appeal substituting the name of the municipal council as plaintiff.

Constitutional law—Conflict with British North America Act.

The provisions of the Local Improvements Act, R.S.S. 1909, c. 88, and the Supplementary Revenue Act, c. 37, R.S.S. 1909, pertaining to taxation, when applied to equitable interests in land in which the Crown holds some interest as well as the legal title, do not violate s. 125 of the British North America Act, where the interest of the Crown is not taxed but the interest of its lessee only.

Calgary and Edmonton Land Co. v. *Attorney-General*, 45 Can. S.C.R. 170, applied.

What tarable—Grazing leases.

The interest of a lessee of public lands under a grazing lease from the Crown, is taxable under the Local Improvements Act, Sask. of 1906, c. 36, as amended by c. 88 of R.S.S. 1909, and the Supplementary Revenue Act, c. 37, R.S.S. 1909.

Rural Municipality of Vermillion Hills v. *Smith*, 10 D.L.R. 32, affirmed; *Calgary & Edmonton Land Co.* v. *Attorney-General*, 45 Can. S.C.R. 170, applied.

J. F. Frame, and *J. F. Hare*, for appellant. *H. Y. MacDonald*, for respondent. *J. M. Carthew*, for the Attorney-General.

Bench and Bar

Judicial Appointments.

England.

The Right Honourable Sir Rufus Daniel Isaacs, K.C., V.O., K.C., M.D., has been appointed Lord Chief Justice of England in the room of Baron, now Viscount Alverstone, resigned. Sir

Rufus was born in London, October 10, 1860. He became Solicitor-General in 1910 and subsequently Attorney-General. He has been a member of the House of Commons since 1904, sitting for the town of Reading.

ONTARIO.

Lorne Bruce Chadwick Livingstone, of the Town of Tilsonburg, Province of Ontario, Barrister-at-Law; to be Judge of the County Court of the County of Welland, in the said Province. (Sept. 24.)

George Montgomery Vance, of the Village of Shelburne, Province of Ontario, K.C., to be Judge of the County Court of the County of Simcoe, in the said Province.

BRITISH COLUMBIA.

William Alexander Macdonald, of the City of Vancouver, Province of British Columbia, K.C., to be a Puisne Justice of the Supreme Court of British Columbia.

SASKATCHEWAN.

William Oswald Smyth, of Swift Current, Province of Saskatchewan, barrister-at-law, to be the Judge of the District Court of the Judicial District of Swift Current. (Oct. 8).

Alexander Duncan Dickson, of Qu'Appelle, Province of Saskatchewan, barrister-at-law: to be the Judge of the District Court of the Judicial District of Humboldt. (Oct. 8).

Charles Edward Dudley Wood, of Regina, Province of Saskatchewan, barrister-at-law: to be the Judge of the District Court of the Judicial District of Weyburn. (Oct. 8).

Flotsam and Jetsam.

The lady litigant had paid out good money to clerks and bailiffs till she was nervous about it.

"Who is that?" she whispered to her lawyer, as a new functionary put in an appearance.

"That? That's the crier," the lawyer replied.

"Goodness! Can't I do my own crying and save the fees?"—*Judge.*

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THE LAW MERCHANT IN CANADA.

There is no part of the history of English law more obscure, said Lord Blackburn,[1] than that connected with the common maxim that the law merchant is part of the law of the land. There is, however, to-day a considerable volume of easily accessible material in English on the history of the law merchant[2] apart from foreign works and works of a more special character.

This lex mercatoria or custom of merchants was formerly not part of the common law of England as it is now, but was a concurrent and co-existent law or custom. It comprised, in addition to a body of maritime law of international character, a body of customary commercial law recognized both in England and on the continent of Europe and slightly affected perhaps by local variations. Up to the reign of Edward III. the law merchant in both its branches was administered in England by local and popular courts of merchants, mariners or civic

(1) Blackburn on Sales, 3 ed., p. 345.

(2) See, *e.g.*, the publications of the Selden Society, especially Select Cases concerning the Law Merchant, 1270-1638 (vol. 1, Local Courts); Select Pleas in the Court of Admiralty (vol. 1, Court of Admiralty of the West, 1390-1404, High Court of Admiralty, 1527-1545; vol. 2, High Court of Admiralty, 1547-1602); also the following essays and extracts from other works: T. E. Scrutton, General Survey of the History of the Law Merchant, being chapter 1 of the Elements of Mercantile Law, 1891, reprinted in 3 Select Essays in Anglo-American Legal History, 1909, p. 7; B. E. S. Brodhurst, The Merchants of the Staple, 17 L.Q.R. 56, 1901, reprinted in 3 Select Essays, p. 16; A. T. Carter, Early History of the Law Merchant, 17 L.Q.R. 232, 1901; F. M. Burdick, What is the Law Merchant? 2 Columbia L.R. 470, 1902, reprinted in 3 Select Essays, etc., p. 34, under the title Contributions of the Law Merchant to the Common Law; W. S. Holdsworth, History of English Law, vol. 1, c. 7, p. 300, 1903, reprinted in 1 Select Essays, etc., p. 289, under the title The Development of the Law Merchant and its Courts; W. Mitchell, Essay on the Early History of the Law Merchant, Cambridge, 1904; T. A. Street, Foundations of Legal Liability, vol. 2, c. 31, p. 324, Northport, N.Y., 1906; see also essays in regard to the early history of negotiable instruments referred to in a subsequent note.

officials. The courts which administered the commercial branch were chiefly the courts of fairs (piepoudre courts), the courts of the more important towns and the courts of the staple. These courts, by administering, helped to create the law merchant. Edward I. was particularly solicitous for the foreign merchants; he endeavoured to give them the speedy justice which they demanded and constituted the King in Council the final court of appeal in mercantile disputes. The staple system dates from his reign, but it was the Statute of the Staple (27 E. 3, st. 2) which consolidated the system and gave Parliamentary sanction to the informal judicial procedure already existing. Certain towns, known as staple towns, were set apart and only in these towns might the more important articles of commerce be dealt in. A mayor and two constables were to be chosen annually in each town to hold the court of the staple with the assistance of two merchants. Justice was to be done to the foreign merchant from day to day and from hour to hour, according to the law of the staple or the law merchant and not according to the common law or particular burghal usages.

The concentration of the foreign trade in the staple towns resulted in the local fair courts becoming less and less important, and the staple courts themselves lost their importance and fell into desuetude when the admiralty in Tudor times assumed jurisdiction in practically all commercial and shipping cases. During the sixteenth century the admiralty was the chief tribunal by which the law merchant was declared.

The admiralty jurisdiction was in turn assailed by the common law courts. The attack began in the reign of Elizabeth, but after Coke's elevation to the bench in 1606 it was carried on more vindictively and was brought to a victorious conclusion under the Commonwealth. The most effective weapon of the common law courts was the writ of prohibition. Not only did the common law courts rigorously prohibit the admiralty from exercising jurisdiction within the bodies of counties, but by means of the non-traversable fiction that a contract really made at sea was made in England, they usurped jurisdiction over com-

mercial causes generally. The importance of the event could not at the time be fully appreciated, for English commerce was destined to expand beyond the most sanguine dreams of the seventeenth century.

The complete incorporation of the law merchant in the common law was not effected till the time of William Murray, first earl of Mansfield, who was chief justice of the King's Bench from 1756 to 1788. Up to his time mercantile business had been divided between the courts of law and equity. No attempt had been made to reduce it to a system. In courts of law "all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. . . . Lord Mansfield . . . may be truly said to be the founder of the commercial law of this country."[3]

The common law procedure was, however, less speedy and effective than that of the admiralty. To the litigant the triumph of the common law courts under Coke "meant much inconvenience. To the commercial law of the country is meant a slower development. But to the common law it meant a capacity for expansion, and a continued supremacy over the law of the future which consolidated the victories won in the political contests of the 17th century. If Lord Mansfield is to be credited with the honourable title of the founder of the commercial law of this country, it must be allowed that Coke gave to the founder of that law his opportunity."[4]

But for Lord Mansfield the merchants might have resorted to the Court of Chancery whose doctrine and practice had much in common with their own. The law merchant borrowed much

(3) Bullen, J., in *Lickbarrow* v. *Mason* (1787), 2 T.R. 63, at p. 73. See also Lord Campbell's account of Lord Mansfield and his special jurymen (Lives of the Chief Justices, vol. 2, p. 407).

(4) Holdsworth, Hist. Eng. Law, vol. 1, p. 326.

from the Roman law, and possibly was the channel through which the Roman law chiefly affected our law.[5]

The law merchant as is pointed out by Cockburn, C.J., in *Goodwin* v. *Robarts* (1875), L.R. 10 Ex. 337, at p. 346 (s.c. 1 App. Cas. 476, 5 R.C. 199), is not fixed and stereotyped, but is capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience. The court proceeded herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell in *Brandao* v. *Barnett* (1846), 12 Cl. & F., at p. 805, 3 R.C., at p. 606, "it becomes a part of the law merchant, which courts of justice are bound to know and recognize. Justice could not be administered if evidence were required to be given toties quoties to support such usages, and issue might be joined upon them in each particular case."

Thus when goldsmiths' or bankers' notes came into general use, Lord Mansfield and the Court of King's Bench had no difficulty in holding that the property in such notes passed by delivery on the ground that they "are treated as money, as cash, in the ordinary course and transaction of business, by the general

(5) A. T. Carter, 17 L.Q.R., at p. 240; cf. T. E. Scrutton, Roman Law in the Law Merchant, extract from The Influence of the Roman Law on the Law of England, Cambridge, 1885, reprinted in 1 Select Essays in Anglo-American Legal History, 1907, p. 237.

consent of mankind, which gives them the credit and currency of money, to all intents and purposes." *Miller* v. *Race* (1758), 1 Burr. at p. 457, 3 R.C. at p. 63.

In *Goodwin* v. *Robarts*, L.R. 10 Ex., at p. 351, Cockburn, C.J., notices another very remarkable instance of the efficacy of usage. It is notorious, he says, that with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a cheque. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker if he has funds, is bound to pay on presentation of a cheque on demand. Even admission of funds is not sufficient to bind an ordinary drawee while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is bound to repay it when called for by the draft of the customer. Besides this, a custom has grown up among bankers themselves of marking cheques as good for the purposes of clearance, by which they become bound to one another.

Bills of lading may also be referred to as an instance of the manner in which general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage as proved in evidence, and ratified by judicial decision in the great case of *Lickbarrow* v. *Mason* (1787), 2 T.R. 63,[7] that the efficacy of bills of lading to pass the property in goods is derived.

(7) Reversed by the Exchequer Chamber, 1 H. Bl. 357; removed into the House of Lords, which awarded a venire de novo, 4 Brown P.C., 2 ed. 57, 6 East 20, note; second trial before the King's Bench, 1794, 5 T.R. 683, 4 R.C. 756.

Again in *Brandao* v. *Barnett*, supra, judicial notice was taken of the usage of trade by which bankers are entitled to a general lien on the securities of customers in their hands.

The greater or less time during which a custom has prevailed may be material in determining how far it has generally prevailed, but if it is once shewn to be universal, it is none the less entitled to prevail because it may not have formed part of the law merchant as previously recognized and adopted by the courts. *Goodwin* v. *Robarts*, L.R. 10 Ex., at p. 356.

A mercantile custom may be so frequently proved in courts of law that the courts will take judicial notice of it, and it becomes part of the law merchant. It would entail useless expense in such a case to require parties to prove by a large number of witnesses a custom which has been proved over and again. But if the reported cases do not clearly establish a custom it must be proved by evidence as on a question of fact. *Ex parte Powell* (1875), 1 Ch. D. 501, at p. 506; *Ex parte Hattersley* (1878), 8 Ch. D. 601; *Chawcour* v. *Salter* (1881), 18 Ch. D. 30, at p. 50; *Edelstein* v. *Schuler*, [1902] 2 K.B. 144, at p. 155. Evidence to establish a custom must relate to the mercantile usage of the place where the obligation is undertaken (*Wisconsin* v. *Bank of B.N.A.* (1861), 21 U.C.R. 284), and is to be performed.

Mercantile usage, however extensive, should not be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law. *Goodwin* v. *Robarts*, supra; *Edie* v. *East India Co.* (1761), 2 Burr. 1216.

The authority given by the factors acts to a mercantile agent, who is in possession of goods with the consent of the owner, to pledge the goods when acting in the ordinary course of business of a mercantile agent, is a general authority given to every mercantile agent, and is not restricted by the existence in any particular trade of a custom that a mercantile agent employed in that trade to sell goods has no authority to pledge them. *Oppenheimer* v. *Attenborough*, [1908] 1 K.B. 221.

A custom to be binding must be not merely general, but also reasonable. *Perry* v. *Barnett* (1885), 15 Q.B.D. 388, and cases cited. Cf. Aske, Custom and the Usages of Trade, pp. 158 ff., 169 ff.

A trade custom, in order to be binding upon the public generally, must be shewn to be known to all persons whose interests require them to have knowledge of its existence, and in any case, the terms of a bill of lading, inconsistent with and repugnant to the custom of a port, must prevail against such custom. *Parsons* v. *Hart* (1900), 30 S.C.R. 473.

The mere fact that a person employs a broker to buy for him in a particular market does not render a local custom of that market binding upon the principal if he is ignorant of the existence of the custom. *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802; *Scott* v. *Godfrey,* [1901] 2 K.B. 726, 734-5; cf. Aske, op. cit., pp. 191 ff.

One important product of the law merchant is the law of exchange which is now part of the common law.

The origin and history of bills of exchange and other negotiable instruments are traced by Cockburn, C.J., in his judgment in the case of *Goodwin* v. *Robarts* (1875), L.R. 10 Ex., at pp. 346 ff. in language which need not be quoted at length. The introduction and use of bills of exchange in England, as indeed everywhere else, seems to have been founded on the mere practice of merchants and gradually to have acquired the force of a custom. The old form of declaration of a bill used always to state that it was drawn secundum usum et consuetudinem mercatorum. The practice of making bills negotiable by endorsement was at first unknown, but from its obvious convenience it speedily came into general use, and, as part of the general custom of merchants received the sanction of the courts. In the beginning the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not. In the time of Chief Justice Holt, a controversy arose between the

courts and merchants, as to whether the customary incidents of negotiability were to be recognized in the case of promissory notes. The dispute was settled by the statute 3 & 4 Anne, c. 9, which vindicated the custom and confirmed the negotiability of notes.[8]

The results of the formation, by custom, of the law of exchange are instructive, as pointed out by Chalmers, 7 ed., p. lxi. (Introduction to third edition):—

"A reference to Marius' treatise on Bills of Exchange, written about 1670, or Beawes' Lex Mercatoria, written about 1720, will shew that the law, or perhaps rather the practice, as to bills of exchange, was even then pretty well defined. Comparing the usage of that time with the law as it now stands, it will be seen that it has been modified in some important respects. Comparing English law with French, it will be seen that, for the most part, where they differ, French law is in strict accordance with the rules laid down by Beawes. The fact is that when Beawes wrote, the law or practice of both nations on this subject was uniform. The French law, however, was embodied in a code by the "Ordonnance de 1673," which is amplified but substantially adopted by the Code de Commerce of 1818. Its development was thus arrested, and it remains in substance what it was 200 years ago. English law has been developed piecemeal by judicial decisions founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt, due in one place, was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French law steadily keeps in view. In England bills

(8) See also W. Cranch, Promissory Notes before and after Lord Holt, reprinted in 3 Select Essays in Anglo-American Legal History, 1909, p. 72, from the appendix to the first volume of Cranch's Reports of Cases in the Supreme Court of the United States, 1804; E. Jenks, Early History of Negotiable Instruments, 9 L.Q.R. 70, 1893, reprinted in 3 Select Essays, etc., p. 51; T. A. Street, Foundations of Legal Liability, 1906, vol. 2, chapters 31 to 40.

have developed into a perfectly flexible paper currency. In France a bill represents a trade transaction; in England it is merely an instrument of credit. English law gives full play to the system of accommodation paper; French law endeavours to stamp it out. A comparison of some of the main points of divergence between English and French law will shew how the two theories are worked out. In England it is no longer necessary to express on a bill that value has been given, for the law raises a presumption to that effect. In France the nature of the value must be expressed, and a false statement of value avoids the bill in the hands of all parties with notice. In England a bill may now be drawn and payable in the same place (formerly it was otherwise, see the definition of bill in Comyns' Digest). In France the place where a bill is drawn must be so far distant from the place where it is payable, that there may be a possible rate of exchange between the two. A false statement of places, so as to evade this rule, avoids the bill in the hands of a holder with notice. As French lawyers put it, a bill of exchange necessarily presupposes a contract of exchange. In England, since 1765, a bill may be drawn payable to bearer, though formerly it was otherwise. In France it must be payable to order; if it were not so, it is clear that the rule requiring the consideration to be expressed would be an absurdity. In England a bill originally payable to order becomes payable to bearer when endorsed in blank. In France an indorsement in blank merely operates as a procuration. An endorsement to operate as a negotiation must be an endorsement to order, and must state the consideration; in short, it must conform to the conditions of an original draft. In England, if a bill be refused acceptance, a right of action at once accrues to the holder. This is a logical consequence of the currency theory. In France no cause of action arises unless the bill is again dishonoured at maturity; the holder, in the meantime, is only entitled to demand security from the drawer and indorsers. In England a sharp distinction is drawn between current and overdue bills. In France no such distinction is drawn. In England no protest is required in the

case of an inland bill, notice of dishonour alone being sufficient. In France every dishonoured bill must be protested. Grave doubts may exist as to whether the English or the French system is the soundest and most beneficial to the mercantile community, but this is a problem which it is beyond the province of a lawyer to attempt to solve."

In every province of Canada except Quebec the common law of England prevails, subject to any provincial or other statutes enacted by competent authority and applicable to the province. It is of no importance to define the precise date or mode of the introduction of the law of England, so far as the unwritten law is concerned, but it may be material to do so for the purpose of deciding to what extent Imperial statutes which are not in force in a particular province proprio vigore are nevertheless in force there by virtue of the general introduction of the law of England.[9]

The Provinces of Nova Scotia and New Brunswick being British colonies by settlement, the original law in force there was the common law of England as modified by such statutes of the mother country as were suitable to the condition of the colony. For this purpose the latest date after which statutes passed in Great Britain would no longer apply to the colony, unless expressly made applicable thereto, is the 3rd of October, 1758, the day of the meeting of the first general assembly of Nova Scotia (then including New Brunswick).

Upon a review of the Nova Scotia decisions, it appears that the admission of Imperial statutes has been the exception; those which have been held to be in force being in the main statutes in amelioration of the rigour of the common law, acts in curtailment of prerogative or in enlargement of the liberty of the subject. To a greater extent than has been the case in either New Brunswick or Ontario, the judges of Nova Scotia have deemed it the office of legislation rather than of judicial visions of Imperial statutes not originally capable of being made

(9) See fuller discussion in Clement, Canadian Constitution, 2 ed., 1904 pp. 38 ff.; Maclaren on Bills, 4 ed., 1909. pp. 10 ff.

operative, but which might be thought suitable to the changed circumstances of the colony.[10]

In Prince Edward Island the law of England was expressly introduced by proclamation as of the 7th October, 1763, and in Ontario by a provincial statute of the 15th October, 1792, it was enacted that from and after the passing of the Act, in all matters of controversy relative to property and civil rights resort should be had to the laws of England as the rule for the decision of the same. It was subsequently held that the terms of this statute did not "place the introduction of the English law on a footing materially different from the footing on which the laws of England stand in those colonies in which they are merely assumed to be in force, on the principles of the common law, by reason of such colonies having been first inhabited and planted by British subjects."[11]

In Manitoba it was held that the common law was introduced on the 2nd May, 1670—the date of the charter of the Hudson's Bay Company,[12] but by provincial statute of 1874 and Dominion statute of 1888, the law of England was introduced as of the 15th July, 1870—the date of the admission of Manitoba into the Dominion.

In the North-West Territories (including prior to 1905, the present Provinces of Saskatchewan and Alberta) the common law was in force as of the 2nd May, 1670, until by Dominion statute of 1886 the law of England was introduced as it existed on the 15th July, 1870.

In British Columbia, the law of England was introduced by provincial statute as of the 19th November, 1858.

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(10) Clement, 2 ed., p. 45. The classic case in Nova Scotia on the subject of the applicability of Imperial statutes is *Uniacke* v. *Dickson* (1848), 2 N.S.R. (James) 287. A leading case in New Brunswick is *Doe dem. Hanington* v. *McFadden* (1836), 2 N.B.R. (Berton) 153.

(11) *Doe dem. Anderson* v. *Todd* (1845), 2 U.C.R. 82. In this case were stated the principles which were substantially adopted in the later cases.

(12) *Sinclair* v. *Mulligan* (1888), 5 Man. R. 17.

In Quebec the Custom of Paris and the common law of France were introduced by the royal edict of 1663 creating the Sovereign Council (later known as the Superior Council) of Quebec. "Avons en outre au dit conseil souverain donné et attribué, donnons et attribuons le pouvoir de connaître de toutes causes civiles et criminelles, pour juger souverainement et en dernier ressort selon les loix et ordonnances de notre royaume, et y procéder autant qu'il se pourra en la forme et manière qui se pratique et se garde, dans le ressort de notre cour de parlement de Paris, nous réservant néanmoins, selons notre pouvoir souverain, de changer, réformer et amplifier les dites loix et ordonnances, d'y déroger, de les abolir, d'en faire de nouvelles, ou tels réglements, statuts et constitutions que nous verrons être plus utiles à notre service et au bien de nos sujets du dit pays."[13]

The lois and ordonnances of earlier date than 1663 had not made many changes in the private law, but several of the grandes ordonnances of Louis XIV. have a special importance for the student of commercial law. The ordinance of 1667 on civil procedure with some modifications was in 1678 brought into force in Quebec by registration with the Sovereign Council.[14] The ordinance of 1673 (sur le commerce) and that of 1681 (sur la marine), which codified the commercial law and the maritime law respectively, were, however, not so registered, and

(13) Edits et Ordonnances Royaux, Déclarations et Arrêts du Consei d'Etat du Roi concernant le Canada (Quebec, 1854), vol. 1, p. 38. The text of the Edit de Création is reprinted in Lemieux, Les Origines du Droit Franco-Canadien, pp, 264-7. The Custom of Paris was explicitly introduced, and resort to any other custom was forbidden, by the Ordinance of 1664 establishing the Compagnie des Indes occidentales. The charter of this company was revoked in 1674 and the territory which had been granted to it was restored to the jurisdiction of the Crown. Lemieux, pp. 272, 311. It is to be noted that the Custom of Paris which had obtained a dominating position among the various customs of France, was far from covering the whole field of private law. The important subjects of obligations and contracts were largely regulated by Roman law. General Survey of Events, Sources, etc., in Continental Legal History (Boston, 1912), pp. 209, 262-3.

(14) Lemieux, op. cit., p. 312.

it is still apparently a debateable question whether they were ever in force in the province.[15]

Whether the ordinances of 1673 and 1681 were technically in force in Quebec or not, their character was such that they might, for the most part, be followed as laying down rules of private law of universal applicability and it is said that they were in fact much relied upon by Lord Mansfield and the other judges who erected the structure of modern English maritime and commercial law.[16]

In addition to the changes made by the ordinances published in France and in force in Quebec, the law of the province was subject to alteration by the arrêts and réglements of the Council of Quebec itself and by the ordinances of the governors and intendants of French Canada.[17]

Whether, after the cession of Canada to Great Britain, English civil law was introduced into the province by the royal proclamation of 1763[18] is another much disputed question,[19] but by the Quebec Act, 1774, the general body of Quebec civil law including the commercial law was re-established as the rule for decision in all matters of controversy relative to property

(15) The contention that these ordinances were not in force in Quebec has received, to some extent, the sanction of judicial decision, and is supported by F. P. Walton, The Scope and Interpretation of the Civil Code of Lower Canada, pp. 2 ff. See also the two opposing views summed up and the authorities referred to by Lemieux (op. cit., pp. 278 ff.), who is of the opinion that the ordinances in question belonged to that class of general laws applicable to the whole kingdom of France which did not require registration in the local parlements. Ibid, p. 292.

(16) Walton, op. cit., pp. 139-140. The declaratory and universal character of the ordinances may reconcile the view that they were not in force in Quebec with the fact that it is not uncommon to find ordinances which had not been registered cited in early cases in Quebec without any statement that they were not in force. Cf. Walton, pp. 4-5.

(17) The whole body of law by which the Custom of Paris was modified is collected in the volumes of Edits et Ordinances and in the five volumes of Jugements et Délibérations du Conseil Souverain de la Nouvelle France also published by the Government of Quebec, 1885-9. Walton, p. 5.

(18) See Shortt and Doughty, Documents relating to the Constitutional History of Canada, 1759-1791, pp. 119 ff.

(19) The two recent writers already cited disagree on this question. See Lemieux, pp. 363 ff.; Walton, pp. 6 ff.

and civil rights. See *Stuart* v. *Bowman* (1853), 3 L.C.R. 309, 3 R.J.R.Q. 228, 268; *Wilcox* v. *Wilcox* (1857), 8 L.C.R. 34.

Notwithstanding the legislation of the century following the Cession, the Custom of Paris continued to be the fundamental law of the province, until in 1866 it was embodied with the statutory law of civil rights and property in the Civil Code of Lower Canada.

Nevertheless some important changes were made by statute in the commercial law of the province during this period. The most notable enactments were the ordinance of the Legislative Council introducing in 1785 the English law of evidence in commercial matters,[20] and the provincial statute 10 & 11 Vict., c. 31, in effect bringing into force the 17th section of the Statute of Frauds.

Still more important modifications have been effected by the practice of the courts. The commerce of the country was always mainly in the hands of the English-speaking part of the community and trade was carried on almost exclusively with England, the United States and the other provinces. It was natural, therefore, that the decisions of English judges on commercial law should come to be treated by Quebec courts with a high degree of deference, and this was all the more natural inasmuch as it was found that there was great similarity between the English and French systems by reason of their common origin in the custom of merchants.[21]

The result seems to be that although English decisions may not necessarily be binding authorities in Quebec because the commercial law of Quebec, as a general rule, is the French law (*Gravelle* v. *Beaudoin* (1863), 7 L.C.J. 289, 11 R.J.R.Q. 221; *Young* v. *Macnider* (1895), 25 S.C.R., at p. 283), yet the practice of the judges has been to consider English decisions as well as French (as, *e.g.*, in *Young* v. *Macnider*, 25 S.C.R., at pp. 277 and 278, and in the court below, Q.R. 3 Q.B. 539; *Glengoil* v.

(20) Shortt and Doughty, op. cit., p. 532.

(21) See Walton, op. cit., p. 21.

Pilkington (1897), 28 S.C.R. 146; *Forget* v. *Ostigny*, [1895] A.C. 318, Q.R. 4 Q.B. 118).

In the recent case of *Préfontaine* v. *Grenier* (1906), Q.R. 15 K.B. 143, involving the liability of a bank president for negligence, many English cases were cited. The members of the Judicial Committee, in affirming the judgment of the Quebec court, said that they thought that, in the absence of any legislation in force in Quebec inconsistent with the law as acted upon in England, and in the absence of any evidence of custom and course of business to the contrary, the Court of King's Bench was right in accepting the English rulings, because they were based, not upon any special rule of English law, nor upon any circumstances of a local character, but upon the broadest considerations of the nature of the position and exigencies of business: [1907] A.C. 110.

Propositions based upon the common law of England will not, however, always be applicable to the province of Quebec, and in a number of instances in the course of this book, attention will be drawn to differences between the law of that province and that of the rest of the Dominion. It is manifest that a bank must in many cases enter into contracts, and both incur and have the benefit of obligations, governed by the civil law of a particular province.

The following are some of the salient general differences between the English and the Quebec law in respect to matters which most frequently concern a bank.[22]

(1) In Quebec the hypothecary system of the Roman law prevails. Under English law a mortgage is a conveyance of the mortgaged land to the mortgagee. The mortgagor retains only an equitable interest known as the equity of redemption. The legal title passes to the mortgagee, who on default may bring an action for foreclosure as well as asking for payment. In Quebec the mortgagor merely hypothecates or charges the land

(22) See "The Banker in the Province of Quebec," 13 J.C.B.A. 230 (April 1906), an address by R. D. McKibbon, introductory to a course of lectures on the Bank Act by A. Rives-Hall (13 J.C.B.A. 237, 298; 14 J.C. B.A. 58, 123, 232).

in favour of the mortgagee, in effect acknowledging the indebtedness as a personal obligation, but retaining the title in himself. On default the mortgagee may recover judgment on the obligation and bring the property to sale at the hands of the sheriff, and is entitled to be paid the amount of the hypothec as a preferred claim out of the proceeds of the sale.

(2) The Quebec law on the subject of married women is also peculiar. Unless husband and wife have made a contract before marriage, they are held by the law to be in community, which means that a partnership is deemed to be established between them, each member being entitled to a half interest. The husband is regarded as the head of the community or as the managing partner of the firm, and may deal with the property according to his own discretion.

Ante-nuptial contracts are quite usual and almost any form of settlement may be made, and a woman's private estate secured to her thereby. Even where such a contract exists, a married woman is subject to a legal disability which does not prevail in the other provinces. As a rule, she requires the authorization of her husband in all business transactions. A wife's mortgage of her separate property is void both as to the debt contracted and as to the disposition if it is in any way for her husband's purposes. Ignorance on the part of the lender that the money was borrowed for the husband's purposes is of no avail and the burden is on him to prove that it was not so borrowed. *Trust & Loan* v. *Gauthier*, [1904] A.C. 94. In the other provinces, speaking generally, a married woman is capable of dealing with, and contracting in respect to, her property.

(3) Another class of persons who in Quebec are under disability to contract is that of "interdicts," that is, persons who are placed under restrictions by the court on account of prodigality, drunkenness, etc., and who cannot contract without the assistance of curators appointed by the court on the advice of a family council.

(4) In Quebec, as in France and other countries under the civil law, the notarial system prevails. The notary is an im-

portant personage. He is not, as in the other provinces, a mere verifier of documents and protester of bills, possessed of a seal and a signature, but is a member of a separate branch of the legal profession. Certain deeds must be signed before a notary, such as deeds of mortgage or hypothec, deeds of donation, marriage contracts, etc. The original deed signed by the parties is retained by the notary, and remains in his office until his death, when it is transferred to the public archives. What are known as "authentic copies" may be issued by the notary, certified by him under his seal of office, and these copies are admitted to proof in court and are sufficient for the purpose of registration in the province.

JOHN D. FALCONBRIDGE.

CANADA'S FEDERAL SYSTEM.

A new book, on Canada's Federal System, by Mr. A. H. F. Lefroy, K.C. (referred to in our review columns), aims at explaining it thoroughly, not only in its constitution, but also in its working, as illustrated by the decided cases, by the records of the Department of Justice at Ottawa, and by discussions before the Judicial Committee of the Privy Council. Mr. Lefroy has carried out his intention excellently well, and the result of his labours will find a ready welcome in many quarters.

Federalism is a subject which is much to the fore at the present time, not only by reason of the interest excited in connection with the proposed change in the government of Ireland, but, also, in connection with the movement, ever growing stronger, for the application of the federal principle to the affairs of England, Scotland, and Wales, while in the far background is the dream of the Imperial Federationists.

A federal constitution, therefore, of which nearly half a century of experience has proved the merit, and which is applied to a country of such divided interests, such an expanding population, and so large a territory as is this Dominion, is well worthy of study at the present time. Moreover, a work like this on the

Canadian Constitution deals with matters of no mere theoretical or academical interest, but with a very important part of the actual law of the land.

Canadians of this generation have become so habituated to the easy and peaceful trend of our public life, as compared with that of other less fortunate countries, that we seldom take thought to realise, in any adequate way, the extreme interest which attached to the planning of the British North America Act, nor the consummate, though unobtrusive, statesmanship and skill, which was manifested in its drafting. Canada in truth took the lead in a notable enterprise of political construction, namely, the combination of the British system of responsible parliamentary government with a federal constitution.

In a banquet at the Canada Club in London, on January 9th, 1867, Lord Carnarvon, who, the following month, was to introduce the Bill in the House of Lords, observed: "It has taken us a long time to construct the great fabric of constitutionable government in England; it requires the exercise of the highest and most statesmanlike qualities to maintain that fabric in equilibrium; and when we come to transplant that system —which means a system of changing Ministries and short-lived Parliaments—to distant Colonies, and to connect it, with, after all, but slight bonds, with a similar system of changing Parliaments and Ministries at home, the marvel is that it has been found to work so harmoniously, and with so much success."

The framers of our federal system essayed to dovetail in between "the changing ministries and short-lived parliaments" of Great Britain on the one hand, and the various Canadian provinces of the other, a ministry and parliament for the Dominion as a whole, while still maintaining unimpaired the imperial union. And it speaks well for the spirit in which our Federal Constitution has been worked, and the loyal and law-respecting disposition of our people, that the Imperial equilibrium has not merely been maintained, but is more stable to-day than ever it was.

But apart from all this, how great and responsible a task it was to frame a fundamental Constitution for the young Dominion. It was no mere question of satisfying the requirements of the country in 1867. As Mr. Lefroy well says in his concluding chapter: "If things were never again to be put into the melting pot—if there was to be no future stirring of foundations—a Constitution must be given to the Dominion which her sons might be satisfied with while the British name lasts."

So far as we know, Mr. Lefroy is the first writer upon our Constitution who has endeavoured to put his finger on the very points wherein the excellence of the work done for this country by the fathers of Confederation, and by those who expressed their intentions in the wording of the Federation Act is manifested, and all concerned are greatly indebted to him for this endeavour and for the masterly and luminous way in which he has accomplished his difficult task.

Mr. Lefroy insists that the main desideratum was not to overdo the machinery required to bring about the desired result. It was necessary to construct a firm framework for the system, but that done, wisdom dictated that the clothing of that framework with the flesh and blood and sinews of a complete body politic, should be left to a process of organic development under the influence of the changing circumstances and expanding conditions of the country as time went on. In a very recent judgment (*Attorney-General for Ontario* v. *Attorney-General for Canada,* [1912] A.C., p. 586), Lord Loreburn, L.C., observed that "the unwritten Constitution of England is a growth, not a fabric." In part, the Constitution of the Dominion had necessarily to be fixed by statutory provision; but, so far as might be, it was expedient, if it was to satisfy successive generations of Canadians, that it should be a growth, and not a fabric.

Mr. Lefroy finds evidence of the recognition of this principle rather in what is not to be found in the North America Act, than in what is in it. He points to the fact, in the first place, that no attempt is made to crystallize by statutory enact-

ment the flexible system of precedents and conventions which make up the customary law of the British Constitution. Then he contends that in indicating the classes of subjects upon which the Dominion or provinces respectively might legislate, the framers of our fundamental statute purposely used vague general language, and overlapping descriptions, in order to leave to time and experience a more exact definition of the federal and provincial areas.

And again, the same self-restraint is shewn in the absence of any attempt to fetter the freedom of our legislatures by fundamental imitations such as abound in the United States Federal and State Constitutions; and which, as Mr. Dicey has pointed out, the very inflexibility of a written Constitution tempts legislators to place among Constitutional articles.

The fathers of Confederation resisted the temptation of enshrining their own individual ideas, or those of their own generation, in the provisions of the British North America Act. They evidently appreciated the wisdom expressed by other legislators, more than 2,000 years before, in the famous clause of the XII Tables of Rome—"The final decision of the people shall be law." In all this too, as Mr. Lefroy has clearly demonstrated, they were faithfully fulfilling the promise expressed in the preamble of the Federation Act—to federally unite us into one Dominion under the Crown, with a Constitution similar in principle to that of the United Kingdom.

The general plan of "Canada's Federal System," as Mr. Lefroy explains in his preface, is to set out, explain, and illustrate all such general principles of construction of the provisions of the British North America Act as are derivable from the authorities, and then to discuss, seriatim, the various law-making powers of the Dominion parliament, and the provincial legislatures in the light of these principles, concluding with a discussion of the provisions of the Act relating to the public property of the Dominion and the provinces respectively.

Of the work as a whole we can truly say that it is a most valuable addition to the literature on the subject discussed, and

more than that, it is a summing up of all previous literature thereon. It is said that no history of events can be accurate until time puts them into their true perspective, and so it may be said that the volume before us is the first chapter in the history of the Constitution of this Canada of ours, whatever its future destiny may be. It gives the history of its past and suggests what future chapters may probably tell to those who come after us.

There will be found in the *Craig Line Steamship Co.* v. *The North British Storage Co.* ([1913], 1 S.L.T. 453) a useful discussion by Lord Hunter as to the question of onus of proof in a claim by consignees against shipowners for short delivery of cargo. The common law rule is that a shipmaster's signature to the bills of lading is sufficient evidence of the truth of their contents to throw upon the shipowner the onus of falsifying them and proving that he received a less quantity of goods to carry than is thus acknowledged by his agent. In the case mentioned the bills of lading contained a statement to the effect that the "weight, quality, quantity and contents," were unknown. Lord Hunter, after a full examination of the decided cases, found that these words shifted the onus and put on the consignee of the cargo the burden of showing that the shortage was due to the fault of the shipowner. The case was accordingly dealt with at the proof on that footing.—*Law Magazine.*

The public will be glad to see the Parcels Post Act passed by the Dominion Legislature. People have too long been subjected to the extortionate charges of Express Companies; and it is well that the example set in other countries as to parcel postage should be followed in this country. The Act is to apply to parcels of all kinds (with a few special exceptions) which do not exceed eleven pounds in weight or greater in size than 72 inches in length and girth combined. The rates are to be fixed by the Postmaster-General.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

DIVORCE — FOREIGN DOMICIL OF HUSBAND — SEPARATE DOMICIL OF WIFE—JURISDICTION.

De Montaigu v. *De Montaigu* (1913) P. 154, is a case which seems to indicate the desirability of some international law on the subject of marriage. In this case a domiciled Frenchman married in England a domiciled Englishwoman. They lived together for some time in England as man and wife, but before very long the husband's father took proceedings in France to have the marriage declared null and void for non-compliance with the French law, and a decree was made there annulling the marriage. The result being that in France they were declared never to have been husband and wife, although validly married according to the law of England, so that the woman was not married according to French law, and yet if she married again she would in England be liable to a prosecution for bigamy. The wife petitioned for a divorce on the ground of desertion and adultery, and no defence was offered. In these circumstances, Evans, P.P.D., held that the rule or theory of law that the domicil of the husband governs the jurisdiction in suits for dissolution of marriage, as distinguished from other matrimonial suits, may be departed from in proper circumstances, and that the cricumstances of this case justified a departure from it and warranted the Court in holding that, for the purpose of such a suit, the wife may be treated as having a domicil of her own sufficient to give the Court jurisdiction to entertain a suit by her for the dissolution of the marriage, and a divorce was accordingly granted.

WILL—CONSTRUCTION—LEGACY — INTEREST — LEGACY PAYABLE AT TWENTY-ONE—POWER TO APPLY LEGACY TOWARDS MAINTENANCE OF LEGATEE—OTHER PROVISIONS FOR MAINTENANCE.

In re West, Westhead v. *Aspland* (1913) 2 Ch. 345. This was an application to determine from what date a legacy of £900 bore interest. The legacy in question was bequeathed by the testatrix to her grand-niece if she should attain twenty-one. The will empowered the trustees in their absolute discretion to

apply the whole or any part of this legacy towards the maintenance and education of the legatee. The testatrix by her will, however, made other provisions for the maintenance and education of the legatee, and bequeathed to her all the money standing to the credit of her current or deposit account, and also devised to her a freehold house. The legatee was thirteen years of age. Warrington, J., held that as the testatrix had made provision for the maintenance and education of the legatee out of other funds, the £900 legacy would only bear interest from the time when the legatee would attain twenty-one.

PRACTICE—DISCOVERY AS BETWEEN CO-DEFENDANTS.

Birchal v. *Birch* (1913) 2 Ch. 375. This was an action by plaintiff, as assignee of the defendant Jackson, to recover from the defendants Birch & Co., commission alleged to be due by them to Jackson. The defendants, Birch & Co., by their defence alleged that the plaintiff had no right at all, inasmuch as they had a claim against Jackson for damages for misrepresentation, which they were entitled to set off against any claim by him for commission. No counterclaim was filed. Birch & Co. applied for an order to examine Jackson for discovery which was refused by Warrington, J., and his order was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Kennedy, and Eady, L.JJ.), Eady, L.J., dissenting.

ADMINISTRATION—REVOCATION OF GRANT—SUPPOSED INTESTACY —SUBSEQUENT DISCOVERY OF WILL—SALE BY ADMINISTRATRIX OF LAND—INVALIDITY OF PURCHASER'S TITLE.

Hewson v. *Shelley* (1913) 2 Ch. 384. In this case the facts were, that a grant of administration was made to a deceased person's estate, on the supposition of intestacy, and the administratrix, his widow, sold the land of the deceased. One-third of the net proceeds was invested to provide dower for the widow of the deceased and the residue was divided between the co-heiresses. After the sale, the widow died, and among her papers a will of her husband was discovered which had slipped out of sight. The parties entitled to the real estate under the will brought the present action to recover possession of the land from the purchasers, and Astbury, J., held that they were entitled to succeed, the sale not having been made for any purpose which the executors of the will would have been obliged to sell.

CORPORATION—CONTRACT NOT UNDER SEAL—EXECUTED CONSIDERATION—WORK DONE AT REQUEST OF CORPORATION NECESSARY FOR PURPOSE FOR WHICH IT WAS CREATED—ACCEPTANCE OF WORK—IMPLIED CONTRACT TO PAY.

In *Douglass* v. *Rhyl Urban District Council* (1913) 2 Ch. 407, the plaintiff claimed to recover for work done for the defendants, a municipal corporation, at their request, as an engineer in making valuations and estimates, and which was necessary to be done for the purpose for which the corporation was created. The contract was not under seal, but the corporation had taken the benefit of the work done by the plaintiff though the scheme for which the work was done was ultimately abandoned. Joyce, J., held that the principle of the decision in *Lawford* v. *Billericay Council* (1903), 1 K.B. 772 (noted ante vol. 39, p. 463) applied, and that the plaintiff was entitled to recover on a *quantum meruit*.

STOCK EXCHANGE—CONTRACT—PRINCIPAL AND AGENT—RIGHT OF BROKER TO INDEMNITY.

In *Aston* v. *Kelsey* (1913) 3 K.B. 314, the plaintiff was a broker employed by the defendant to purchase shares in the stock market for the purpose of speculation, and sought to recover moneys expended by him in and about the purchase. The plaintiff lived at Harrogate and instructed brokers in London and Glasgow to buy the shares required. These brokers purchased the shares from jobbers and sent a note of the purchase to the plaintiff including their commission in the price, without mentioning how much it was, but stating the price to be net. The plaintiff then sent a similar note to the defendant and added a specified sum for his commission. The defendant claimed that the plaintiff in concealing the commission charged by the London and Glasgow brokers, had not acted as brokers, but as principal in buying the shares from them, and was, therefore, not entitled to indemnity from the defendant. Bailhache, J., who tried the case, was, on the facts, in favour of the plaintiff, but thought the case was governed by *Johnson* v. *Kearley* (1908), 2 K.B. 514. The Court of Appeal (Cozens-Hardy, M.R., and Hamilton, L.J., and Bray, J., however, reversed his decision (Cozens-Hardy, M.R., *dubitante*). The Court of Appeal being of the opinion that, on the facts, the cases were distin-

guishable, and that the plaintiff had in fact acted as it was intended he should act in the carrying out of the contract in question.

PRINCIPAL AND SURETY—BANK GUARANTEE—DUTY OF BANK TO GUARANTOR—NON-DISCLOSURE BY BANK TO GUARANTOR OF SUSPICIONS CONCERNING CONDUCT OF DEBTOR — RELEASE OF SURETY.

National Provincial Bank of England v. *Glanusk* (1913) 3 K.B. 335. This was an action by a bank on a guaranty given by the defendant for the payment of all moneys due by one Coles, a customer of the bank. Coles was also the agent of an estate, of which the defendant was life tenant. The manager of the bank had suspicions that Coles was using the funds of this estate illegitimately, and for other than the purposes of the estate, but he omitted to communicate these suspicions to the defendant. The defendant claimed that this omission had the effect of discharging him from liability, but Horridge, J., who tried the action, held that it did not, and that although in the case of a fidelity guaranty such an omission would work a discharge of a surety, yet that rule did not apply in the case of a guaranty of a debt, and that the bank were under no obligation to communicate suspicions affecting the credit of the debtor, even if it entertained them, but he thought the evidence indicated that they had in fact been removed on inquiry.

NEGLIGENCE—BREACH OF DUTY—HORSE AND CARRIAGE HIRED BY HUSBAND—VICIOUS HORSE—INJURY TO WIFE — KNOWLEDGE OF OWNER—CONTROL OF CARRIAGE—ACCEPTANCE OF WIFE AS PASSENGER.

White v. *Steadman* (1913) 3 K.B. 340. This was an action by husband and wife to recover damages for injuries sustained by them in the following circumstances. The husband hired from the defendant, a livery stable keeper, a landau with horse and driver for the purpose of taking a drive. His wife accompanied him in the carriage. The horse shied on meeting a traction engine and became unmanageable, the carriage was upset and both husband and wife were injured. The jury found that the defendant ought to have known, if he had used proper care, that the horse was unsafe to be sent out with the carriage, but that the driver was not negligent. On these findings the de-

fendant admitted liability to the husband, but contended that he was not liable to the wife. Lush, J., who tried the action, held, that on the finding of the jury, the defendant must be deemed to have known that the horse was unsafe, and that it was his duty to have warned the wife (who was one of the persons defendant must be taken to have contemplated would use the carriage) of the dangerous character of the horse, and that this duty arose independently of contract, and therefore that the defendant was also liable to the wife.—See the next case.

NEGLIGENCE—DANGEROUS ARTICLE—SALE BY MANUFACTURER TO SHOPKEEPER—SALE BY SHOPKEEPER TO PLAINTIFF—DEFECT UNKNOWN TO VENDORS—MEANS OF KNOWLEDGE—LIABILITY OF MANUFACTURER.

Bates v. *Batey* (1913) 3 K.B. 351. This is a case very similar in its facts to the case of *Hill* v. *Rice Lewis*,* recently before the Ontario Court. In the present case the defendants manufactured ginger beer which they placed in bottles bought from another firm. They sold the bottled ginger beer to a shopkeeper, from whom the plaintiff bought one bottle. Owing to a defect in this bottle, it burst while the plaintiff was opening it, and injured him. The defendants did not know of the defect, but might have discovered it by the exercise of reasonable care. Horridge, J., who tried the action, held that notwithstanding the defendants might have discovered the defect by the exercise of reasonable care, yet, as they were in fact ignorant of it, they were not liable. The learned judge distinguishes the case from the preceding case on the ground that here the bottle was not in itself dangerous, and, inferentially, he considers a horse is.

RAILWAY—CARRIAGE OF GOODS — GOODS RECEIVED BY RAILWAY "SUBJECT TO GENERAL LIEN FOR ANY MONEYS DUE TO THEM FROM THE OWNERS OF SUCH GOODS UPON ANY ACCOUNT"—STOPPAGE IN TRANSITU—RIGHTS OF CONSIGNOR AS AGAINST RAILWAY.

United States Steel Products Co. v. *Great Western Ry. Co.* (1913) 3 K.B. 357. In this case the plaintiffs were the vendors of certain goods which they delivered to the defendant company for carriage to the purchasers. The goods were received

*28 O.L.R. 366.

on condition that they should be subject to a general lien for any moneys due to the company from the owners of the goods on any account whatever. The plaintiffs paid all freight and charges in respect of the carriage of the goods, and, while the goods were still in the possession of the railway company, the plaintiffs stopped them in transitu. The buyers were indebted to the defendants in the sum of £1,170 which did not include any freight or charges on the goods in question, and they claimed that, under the terms of the consignment note, they had a lien on the goods as against the plaintiffs in respect of the £1,170; but Pickford, J., held, that although the words of the consignment note were wide enough to extend considerably further, yet that the condition ought to be read as meaning that the railway company should not be bound to deliver the goods to the consignee until he had discharged any debt due by him to the railway; but that it ought not to be read as creating a lien on the goods as against persons who had nothing to do with the debt, and, therefore, that the defendants were not entitled to hold the goods as against the plaintiffs.

SHIP—CHARTER PARTY—DEMURRAGE—PERIOD OF DEMURRAGE NOT SPECIFIED—DETENTION OF SHIP BEYOND REASONABLE TIME—DAMAGES—MEASURE OF DAMAGES.

Western Steamship Co. v. *Amaral* (1913), 3 K.B. 366. This was an action by vessel owners to recover damages from the charterer, for detention of the chartered vessel. The charter party provided that if the ship was detained at the port of discharge after the expiry of the lay days, demurrage should be payable at a specified rate; but was silent as to the period for which she could be kept on demurrage. The vessel arrived at the port of discharge on May 17, and her lay days expired on May 31, but she was not discharged until July 14. The plaintiffs contended that the defendants were entitled to detain the vessel for a reasonable time, but as they detained her longer than was reasonable, they claimed to recover damages for the period beyond what was a reasonable time, which they claimed should not be measured by the rate specified for demurrage; but Bray, J., who tried the action, was of the opinion that the plaintiff had a right to take away the ship if it were detained beyond a reasonable time, but that if they chose to let it remain, the demurrage rate of compensation applied to the whole period of detention.

FOREIGN JUDGMENT—COLONIAL JUDGMENT AGAINST DEFENDANT BORN IN COLONY—"SUBJECT" OF COLONY—DEFENDANT NOT DOMICILED OR RESIDENT IN COLONY WHEN JUDGMENT RECOVERED—ENFORCING FOREIGN JUDGMENT.

Gavin v. *Gibson* (1913) 2 K.B. 379. This was an action on a judgment recovered in the Colony of Victoria, Australia. The defendant was born in that colony, but was not resident or domiciled there when the judgment was recovered against him. The defendant was personally served with the writ in England, and had an agent in Victoria whom he instructed to defend the action, and instruct solicitors, but no appearance was entered and the action was not defended, and judgment was recovered by default. It was contended that the case was within the first of the cases mentioned by Fry, J., in *Rousillon* v. *Rousillon*, 14 Ch. D., at p. 371, in which the Court holds a foreign judgment to be binding on a defendant, *e.g.*, "where he is a subject of the foreign country in which the judgment has been obtained," because, as was contended, the defendant was a "subject" of the Colony of Victoria. But Atkin, J., who tried the case, came to the conclusion that there is no such thing as a subject of a colony—that a subject of the British Crown involves a personal tie to the King, and that the subject's nationality is the British Empire and not confined to any particular locality in the Empire, the Crown being one and indivisible, and that a British subject's nationality, therefore, cannot be limited to any part of the Dominions of the Crown. The jurisdiction of the Colonial Court, he held to be territorial, and, therefore, the defendant not being within its jurisdiction, and not having submitted to its jurisdiction, the judgment was therefore not conclusive on him in an English Court.

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Lord Chancellor, Lords Dunedin, Atkinson, Moulton.] [18 D.L.R. 618.

GRAND TRUNK R. Co. *v.* MCALPINE.

1. *Railways—Accident at crossing—Signals—At what place required—City streets—Shunting engine.*

The requirement of sec. 274 of the Railway Act, R.S.C. 1906, ch. 37, that a train on approaching a highway crossing shall sound its whistle when at least eighty rods therefrom is not applicable to an engine engaged in shunting cars in a city yard, which at no time was more than one hundred yards distant from a street crossing.

2. *Railways—Accident at crossing—Lookout—Backing engine—Giving warning of approach—Sufficiency of.*

It is not necessary that a person about to cross a railway track at a street crossing should have actually heard the warning given by an employee standing on the tender of a backing locomotive, in order to relieve a railway company of the duty imposed on it by sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, in running trains not headed by an engine moving forward in the ordinary manner over a level crossing, to have a man stationed on that part of the train then foremost, in order to warn persons standing on or about to cross the tracks; since the warning required is only such that, if given in time to avoid danger, it ought to have been apprehended by a person in possession of ordinary faculties, in a reasonably sound, active and alert condition.

3. *Railways—Contributory negligence—Accident at crossing—Failure to stop, look and listen—Duty of person about to cross track.*

The duty incumbent on a person who is about to cross a railway track at a highway crossing at grade to look for moving trains is not satisfied by merely looking both ways on approaching the tracks; he must look again just before crossing.

where the same subject has not been adjudicated, although such former actions may have been between the same parties and concerning the same estate.

Kennedy v. *Kennedy*, 11 D.L.R. 328, affirmed.

E. Douglas Armour, K.C., for appellant. *S. O. Buckmaster*, K.C., for David Kennedy, Robert Kennedy, and Joseph H. Kennedy. *A. J. Russell Snow*, K.C., for Madeline Kennedy.

Lords Atkinson, Shaw, Moulton.] [13 D.L.R. 730.

CLARKSON *v.* WISHART.

Mines and minerals—Levy and seizure—Mining claims, unpatented—Exigibility—Interest—Lands.

The interest of a mining claimant in an unpatented claim duly recorded under the provisions of secs. 34, 35, 53, 59 and 64 of the Mining Act, 8 Edw. VII. (Ont.), ch. 21, R.S.O. 1914, ch. 32, is exigible for a judgment debt due by the claimant.

Re Clarkson and Wishart, 6 D.L.R. 579, 27 O.L.R. 70, reversed; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145; and *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 405, applied.

While the issue of a certificate of record to a claimant in an unpatented mining claim is declared by sec. 68 of the Mining Act, 8 Edw. VII. (Ont.), ch. 21, R.S.O. 1914, ch. 32, to create a tenancy at will as between the claimant and the Crown, such reference must be taken in conjunction with the other provisions of the statute in determining what is exigible under execution at the instance of a judgment creditor of the claimant, and the effect is that, notwithstanding such declaration, substantial rights are vested in the claimant which come within the word "lands" as used in the Execution Act (Ont.), 9 Edw. VII., ch. 47, R.S.O. 1914, ch. 80.

Re Clarkson and Wishart, 6 D.L.R. 579, 27 O.L.R. 70, reversed; *McPherson* v. *Temiskaming Lumber Co.*, 9 D.L.R. 726, [1913] A.C. 145; and *Glenwood Lumber Co.* v. *Phillips*, [1904] A.C. 450, specially referred to.

Sir Robert Finlay, K.C., and *Archibald Read*, for appellants. *J. M. Godfrey*, for respondents.

Lords Atkinson, Shaw, Moulton.] [13 D.L.R. 761.

MCMILLAN *v.* STAVERT.

1. *Bills and notes—Illegal consideration—Bank trafficking in its own shares.*

Promissory notes given to a bank by certain of its directors are not invalidated as for an illegal consideration by reason of the fact that they were given for the purpose of recouping to the bank, moneys which had been unlawfully and without the authority of its shareholders employed in the purchase of the bank's shares in furtherance of a scheme whereby the bank's funds were used in trafficking in its own shares to support the price quotations of same on the stock market. *Staver* v. *McMillan* (1911), 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.

2. *Banks—Liability of directors—Breach of trust.*

Where, in breach of trust and without the authority of any resolution of the board of directors or other corporate act of a chartered bank, funds of the bank were used by its manager, in connivance with one or more of the directors, to make purchases of bank shares in the names of brokers and others who were allowed to overdraw their accounts with the bank to make the purchases, knowing that the bank was prohibited by statute from purchasing or dealing in its own shares, the duty of the other directors, on ascertaining that such breach of trust had been committed, was to repudiate the transactions and insist on the restoration to the bank of the funds illegally diverted; in such event there could be no claim to indemnity against the bank on the part of such nominal purchasers even if the bank asserted a lien on the shares for the overdrafts while repudiating the purchases; nor can any claim for indemnity against the bank arise in favour of the directors who, after the illegal diversion of funds had occurred, attempted to rectify the same by an adjustment, whereby promissory notes of the directors were given to the bank to recoup it for the money unlawfully diverted, although the recoupment represented the price of the shares illegally purchased.

Stavert v. *McMillan* (1911), 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.

Sir Robert Findlay, K.C., and *D. L. McCarthy*, K.C., for appellants McMillan. *S. O. Buckmaster*, K.C., and *R. H. Roope Reeves*, for respondent Stavert. *Macoun*, for third party.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Meredith, C.J.O., Maclaren,
Magee, Hodgins, JJ.A.] [13 D.L.R. 750.

RE OLMSTEAD AND EXPLORATION SYNDICATE OF ONTARIO.

Mines and minerals—Claims—Location—Notice and record of claim—Application and sketch.

Under ss. 59 to 65 of the Mining Act, 8 Edw. VII. (Ont.), c. 21, R.S.O. 1914, c. 32, the foundation of the right which a staker acquires or may acquire, is the claim and sketch filed with the recorder after compliance with the requirements as to discovery and staking; and, in determining the area of the location, such application and sketch will control as against the marking of the supposed limits on the recorder's map and the granting of a certificate of record without specific description other than the number of the claim.

J. Lorn McDougall, for the appellant. *W. R. Smyth*, K.C., for the respondents.

Province of Quebec.

SUPERIOR COURT.

EX PARTE HARRY K. THAW (No. 1).

Globensky, J.] [13 D.L.R.

Habeas corpus—Discontinuance—Parties.

A prisoner who applies for and obtains a writ of habeas corpus, alleging unjust detention, has the right to discontinue and desist from his petition, and the Court will give effect to an application for the discontinuance of the proceedings, and order the prisoner's return to jail.

Where the application for the issue of a writ of habeas corpus is made by the prisoner himself, the party who laid the information upon which the prisoner was originally arrested has no status to appear in the habeas corpus proceedings, and ask for the liberation of the prisoner, although such party claims that the prisoner has been illegally arrested.

As to status of information to obtain a writ of habeas corpus, see *Re Thaw, Boudreau* v. *Thaw* (No. 2), post.

J. N. Greenshields, K.C., *W. L. Shurtleff,* K.C., *C. D. White,* K.C., *H. R. Fraser,* K.C., and *W. K. McKeown,* for Thaw. *S. W. Jacobs,* K.C., *J. Nicol.* K.C., and *Hector Verret,* K.C., for Boudreau.

RE HARRY K. THAW (No. 2).

BOUDREAU *v.* THAW.

Hutchinson, J.] [13 D.L.R.

Habeas corpus—Demand by party who laid information upon which prisoner was arrested—Prisoner's opposition to his own liberation—Informant—Petition.

The petition for a writ of *habeas corpus* issued under authority of c. 95 of the Consol. Stat. of L.C. (which extend the provisions of the English Habeas Corpus Act to the Province of Quebec) can validly be made by the party who illegally caused the arrest of the prisoner, although the prisoner may by intervention oppose the application, and by affidavit declare the same is so made without his authority, the prisoner further declaring that he desires to remain in jail.

See *Re Thaw* (No. 3), post p. 672.

Any person is entitled to institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating another from illegal imprisonment.

Hottentot Venus Case, 13 East's Reports 195, followed.

A party who causes the arrest of another, and who subsequently is advised that such arrest is illegal, is entitled to apply for a writ of habeas corpus, to the end that the person arrested may be restored to his liberty.

The term "on behalf of," when used in an application for a habeas corpus, means "in the name of," "on account of," "for the advantage of," or "in the interests of" another.

Compare *R.* v. *McIver,* 7 Can. Cr. Cas. 183.

No legal relationship is required to exist between the prisoner and the person making the application for a writ of habeas corpus for the prisoner's release.

S. W. Jacobs, K.C., *J. Nicol,* K.C., and *Hector Verret,*

K.C., for the petitioner, Boudreau. *W. L. Shurtleff*, K.C., *C. D. White*, K.C. *H. R. Fraser*, K.C., and *W. K. McKeown*, for the prisoner.

KING'S BENCH.

Archambeault, C.J., Lavergne, Cross, Carroll, Gervais, JJ.] [13 D.L.R. 715.

RE HARRY K. THAW.

THAW *v.* ROBERTSON (No. 3).

1. *Habeas corpus—Procedure—Serving original writ.*

A writ of habeas corpus can be properly served only by delivering the original writ to the person to whom it is addressed, or to the principal person where there are more than one; and where only copies of the writ had been served the irregularity is a ground for quashing the writ, although the original had been exhibited to the persons to whom it was addressed at the time when the copies were left with them.

2. *Aliens—Immigration Act (Can.)—Right to test constitutionality of habeas corpus.*

The provisions of the Immigration Act (Can.) depriving an alien ordered to be deported of any right to apply to the courts to review, quash, reverse, restrain, or otherwise interfere with an order of deportation made "under the authority and in accordance with the provisions of the Act" may prevent a writ of prohibition to the immigration officers, but it does not remove the right of the person detained to obtain a writ of habeas corpus to test the constitutionality of the statute; on due service of such writ the immigration officers would be bound, under penalty for contempt, to make return thereto with reasons assigned for the detention.

See *Re Gaynor and Greene* (No. 8), 9 Can. Cr. Cas. 496.

J. N. Greenshields, K.C., *N. K. Laflamme*, K.C., and *W. K. McKeown*, for petitioner Thaw. *L. T. Marechal*, K.C., and *Gustave Lamothe*, K.C., for respondents.

ANNOTATION ON ABOVE CASES—HABEAS CORPUS PROCEDURE.

The practice in *habeas corpus* in criminal matters varies in the several provinces, although subject to the same federal control as a part of the

criminal law and criminal procedure assigned by the constitution (the B.N.A. Act) to the exclusive jurisdiction of the Parliament of Canada.

This is due to the continuance in effect of the local practice which was in force at the time when each province entered Confederation, except as it might subsequently be varied under statutory authority. As to criminal matters, the writ of *habeas corpus* is specially dealt with in secs. 576, 941, and 1120 of the Criminal Code, 1906.

Sec. 576 of the Criminal Code confers power upon every superior Court of criminal jurisdiction to pass rules of Court to apply to all proceedings relating to any prosecution, proceeding or action instituted in relation to any "matter of a criminal nature or resulting from or incidental to any such matter," and in particular (*inter alia*) for regulating *in criminal matters* the pleading, practice and procedure in the Court including the subjects of mandamus, *certiorari*, *habeas corpus*, etc.

The term "criminal matter" has been held in England to have a very wide significance and to include a matter in the result of which the party may be fined or imprisoned as for a wrong: *Seaman* v. *Burley*, [1896] 2 Q.B. 344; *R.* v. *Fletcher*, 2 Q.B.D. 47; and, in this sense, prosecutions under certain provincial statutes such as the liquor laws are sometimes spoken of as proceedings relating to provincial crimes or as quasi-criminal prosecutions.

Whether or not a detention order made as in *Re Thaw* (No. 3), *supra*, under the Immigration Act, could properly be placed in the category of "criminal matters" it did not become necessary to decide because of the irregularity in the service of a copy of the writ instead of the original writ itself. This objection would apply whether or not the writ was to be controlled by the criminal law practice under federal jurisdiction or the civil practice under provincial jurisdiction. In the provinces of Ontario and Quebec, no rules of Court have yet been passed under the Criminal Code for the purpose of regulating *habeas corpus* practice in criminal matters, although *certiorari* rules were passed in Ontario, 27th March, 1908 (Ont. Consolidated Rules 1279-1288), which are not affected by the Consolidated Rules, 1913, the latter being a consolidation of the rules in civil cases only.

If a writ of *habeas corpus* is issued under the *Habeas Corpus* Act, 1679, it must be indorsed "*per statutum*, etc.," and signed by the person who awards the same, this being an express requirement of 31 Car. II. ch. 2. If a writ were issued not so indorsed, it may still be a good writ of *habeas corpus* at common law: *Crosby's Case* (1771), 3 Wils. 188; *Hobhouse's Case* (1820), 3 B. & Ald. 420.

The writ of *habeas corpus* as regards the Canadian Immigration law (9 and 10 Edw. VII. (Can.) ch. 2), is subject to the restriction contained in sec. 23 of the latter statute directing, in effect, that the Court shall not have jurisdiction to review or quash detention orders made under the authority and in accordance with the provisions of the Immigration Act unless the person detained is a Canadian citizen or has Canadian domicile. The right to a *habeas corpus* exists by the common law and is not created by

statute: *Re Besset*, 6 Q.B. 481, 14 L.J.M.C. 17. The right to the writ has, however, been confirmed by various statutes both in England and in Canada: *Re Sproule*, 12 Can. S.C.R. 140.

The original *Habeas Corpus* Act, 31 Car. II. ch. 2, provided for the issuing of the writ in all cases where a person is committed or detained for any cause (except for felony or treason plainly expressed in the warrant) upon the application of the person detained or *of any one in his behalf*, and it applied only to cases of detention or imprisonment for "criminal or supposed criminal offences." This statute was introduced into the old "Province of Canada" now the Provinces of Ontario and Quebec as part of the criminal law of England under the Quebec Act, 1774: see Cr. Code 1906, sec. 10, and *R.* v. *Malloy*, 4 Can. Cr. Cas. 116 (Ont.).

The Habeas Corpus Act, 31 Car. II. ch. 2, was intended to meet the various devices by which the common law right to the writ had theretofore been evaded, and, in particular, by making the writ readily accessible during vacation, by obviating the necessity for the issue of a second and third writ known respectively as the *alias* and *pluries* writ, by imposing penalties for the wrongful refusal of the writ, and generally by regulating the granting and issue of the writ, and the procedure upon its return. As the Act applied only to cases where persons were detained in custody for some "criminal or supposed criminal matter," its beneficial provisions did not extend to cases of illegal deprivation of liberty otherwise than on a "criminal charge" as, for example, where children were unlawfully detained from their parents or guardians by persons who were not entitled to their custody, or where a person was wrongfully kept under restraint as a lunatic, or where a person was illegally kept in confinement by another. In all such cases the issue of the writ during vacation depended solely upon the common law and remained unregulated by statute in England until the year 1816, on the passing of the *Habeas Corpus* Act, 1816. In Canada, provincial statutes have been passed upon similar lines to the latter Act, so as to facilitate the speedy hearing of the questions involving the regularity of the detention.

A statute of the late Province of Canada, 29 and 30 Vict. ch. 45, extended the application of the writ to matters other than criminal matters, and fixed the practice in certain particulars: *R.* v. *Cameron*, 1 Can. Cr. Cas. 169; *R.* v. *Bougie*, 3 Can. Cr. Cas. 487; *R.* v. *Marquis*, 8 Can. Cr. Cas. 346. That practice, except as it may be altered under federal authority, remains effective in Ontario and Quebec.

In Ontario and Quebec, the writ of *habeas corpus* is the institution of the proceedings and until its return there is ordinarily no opportunity for the opposing party to be heard. The writ itself is granted on an *ex parte* application, and while probably the Crown, as represented by the Attorney-General's department of the province, might, in a criminal matter, intervene and be heard in opposition to the motion for the writ, it is not the practice to notify the department of the intention to apply in those provinces. The writ having been obtained on an *ex parte* motion and service

made on the gaoler or person detaining another in custody, the latter must make his return along with the original writ, it being so directed by the command contained in the writ itself. So it was held in *R.* v. *Rowe* (1894), 71 L.T. 578, referred to in Tremeear's Criminal Law, 2nd ed., 822, that, if the original writ is not delivered to the principal of several persons to be served, the service of a copy of the writ upon the others is not a good service upon any of the others. When it is possible to effect personal service, a writ of *habeas corpus* can only be properly served by actually delivering the original writ to the person to be served, and, if a copy of the writ is served, this is an irregularity which the person served cannot waive by appearing, so as to render himself liable for attachment for disobedience to the writ: *R.* v. *Rowe* (1894), 71 L.T. 578. In the event of the original writ being inadvertently lost before service, a new writ might be allowed to issue: *Pease* v. *Shrimpton* (1651), Sty. 261.

The "return" to the writ if duly made will be endorsed upon or attached to the original writ, and no proof of service will be required: *Re Carmichael*, 10 C.L.J. 325. If the "return" is not made in due form together with the writ served, a motion to attach the delinquent would be in order. An affidavit of a gaoler verifying a copy of the warrant has been accepted as a return when it was accompanied by the original order in the nature of a *habeas corpus* made under the Liberty of the Subject Act, R.S.N.S. 1900, ch. 181, which provides an alternative procedure by motion in Nova Scotia in lieu of the actual issue of a writ: *R.* v. *Skinner*, 9 Can. Cr. Cas. 558.

In other provinces of Canada a different practice prevails in instituting *habeas corpus* proceedings from that followed in Ontario and Quebec. In the Province of Alberta it is the established practice, following in this respect the practice which prevailed in the Courts of the former North-West Territories, to issue a rule *nisi* to be served upon the custodian of the detained party and all others interested as respondents, and which called upon each of them to shew cause why a writ of *habeas corpus* should not issue, and why, in the event of the rule being made absolute, the prisoner should not be discharged without the actual issue of the writ: *R.* v. *Farrar* (1890), 1 Terr. L.R. 306; and see the English case of *Ex parte Eggington*, 2 E. & B. 717. By the Crown Office Rules of British Columbia, 1906, a similar procedure is recognized in that province. An application is to be made either to the Court or a Judge, and if to a Judge he may order the writ to issue *ex parte* in the first instance, or may direct the issue of a summons for the writ: Crown Office Rules (Civil), 1906, rules 235 and 237; Crown Office Rules (Criminal), 1906, rule 1. If, however, the application is to be made to the Court and not merely to a Judge, it must be made by motion for an order, which if the Court so direct may be made absolute *ex parte* for the writ to issue in the first instance, or the Court may follow the more usual course of granting an order *nisi* to shew cause why the writ should not issue. On the argument of the order *nisi* the Court has a discretion, under Crown Office Rule 244, to direct an order to be drawn up for the prisoner's discharge, instead of waiting for

the return of the writ, and such order is expressly made a sufficient warrant to any "gaoler or constable or other person" for his discharge.

In Saskatchewan, by the Practice Rules of 1911 (Crown Rule 35), on the argument of a motion for a writ of *habeas corpus* the Court or a Judge may, in their or his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ. Crown Rule 32 (Sask.) requires that, where a return of the writ is made, it shall contain a copy of all the causes of the prisoner's detention indorsed *on the writ* or on a separate schedule annexed to it, but a general clause (Crown Rule 38) provides that it shall not be necessary to serve the original of any writ, but a copy only.

In Manitoba, also, the practice permits of a preliminary summons for the writ of *habeas corpus*, and, by agreement, the whole matter may be presented and disposed of on the return of the summons as if the writs had been issued and had been returned: *R.* v. *Johnson*, 19 Can. Cr. Cas. 203, 1 D.L.R. 548.

A Judge of the Supreme Court of Canada has concurrent jurisdiction with provincial Courts to grant a writ of *habeas corpus* under the Supreme Court Act, R.S.C. 1906, ch. 139, sec. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament: *Re Dean*, 20 Can. Cr. Cas. 374, 9 D.L.R. 364.

Book Reviews.

Canada's Federal System, being a treatise on Canadian Constitutional Law under the British North America Act. By A. H. F. LEFROY, K.C. Toronto: Carswell & Co., Limited, 1913. 966 pp.)

Mr. Lefroy is well known as a student of Constitutional Law and has written much on the subject. The result of his researches, his knowledge and intelligent criticisms find their place in the volume before us, and we welcome its appearance. As we have given it an extended notice in our editorial columns we refer our readers to previous pages. It will doubtless have a large sale amongst all those who are interested in this most important subject in other places as well as Canada.

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ACTIONS FOR MALICIOUS PROSECUTION—FUNCTIONS OF JUDGE AND JURY.

It was provided by the Judicature Act, R.S.O. 1897, c. 51, s. 112, that, upon a trial by jury in any case, except an action of libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any question of fact stated to them by the judge for the purpose.

Mr. Justice Anglin, in referring to this enactment in the case of *Still* v. *Hastings*, 13 O.L.R. 322, said: "I read this section as tantamount to an express prohibition against the putting of questions to a jury in actions of the classes enumerated. Notwithstanding its provisions, however, appellate courts have affirmed the propriety of submitting questions to the jury in actions for malicious prosecution, and, in reviewing cases in which questions have been put they have expressed no disapproval of that course."

The learned judge in the same case also said, "It is often practically impossible to direct a jury hypothetically as to the facts upon which reasonable and probable cause depends in such a manner that there can be any certainty that the jury at all appreciate the nature and the scope of its duties in regard to the matters involved in this issue; or any assurance that, in pronouncing a general verdict, the jury will confine itself to the consideration of matters legitimately the subject of its findings. I would, therefore, suggest the advisibility of eliminating from the exceptions in s. 112 of the Judicature Act actions for malicious prosecution."

The practice up to the passing of the Judicature Act of

1913, in actions for malicious prosecution, is clearly stated in the text books to be that "the existence of reasonable and probable cause is a question for the judge, and not for the jury." The rule, however, is subject to the qualifications that all preliminary questions of fact on which this ultimate issue depends are for the jury. That is to say, the jury must find what the facts of the case were, as known to or believed by the defendant, and then the judge decides whether those facts constituted reasonable and probable cause: viz., whether the defendant shewed reasonable care and judgment in believing and acting as he did. Thus, if the defendant alleges that he prosecuted the plaintiff because of certain information received from a third person, it is for the jury to say whether that information was really received by the defendant and whether it was really believed by him, and it is for the judge to decide whether, if it was so received and believed, it constituted a reasonable ground for the prosecution. This division of functions between judge and jury may be effected at the discretion of the judge in two ways. He may either direct the jury to find the facts specially, and then decide for himself on the facts so found whether there was reasonable and probable cause, or he may tell the jury that if they find the facts to be otherwise, there is none, thus leaving the jury to find a general verdict on this hypothetical direction.

This subject was discussed in a recent case in the Province of Ontario (*Ford* v. *Canadian Express Company*, 21 O.L.R. 593), and from the judgment in that case we gather that, notwithstanding the prohibition spoken of by Mr. Justice Anglin, trial judges have usually submitted questions to the jury; and, although the existence of reasonable and probable cause is a question for the trial judge, questions are often left to the jury on the issue as to the want of reasonable and probable cause, such as questions of reasonable care and questions of honest belief, etc., and these questions have been held to be proper questions to be left to the jury under certain conditions.

As has been seen, Mr. Justice Anglin held that the practice of submitting questions to the jury in actions for malicious pro-

secution is illegal, and suggested the advisability of eliminating from the exceptions in s. 112 of the former Judicature Act actions for malicious prosecution.

This apparently led to the passing of s. 62 of the Judicature Act of 1913 (3 & 4 Geo. 5, c. 19), which provides that "in actions for malicious prosecution the judge shall decide all questions both of law and fact necessary for determining whether in not there was reasonable and probable cause for the prosecution."

Sec. 60 of the same Act says that a jury may give a special or general verdict, but shall give a special verdict if the judge so directs and shall not give a general verdict if directed by him not to do so.

By s. 61, the judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated by him and the jury shall answer such questions and not give any verdict.

It does not appear to us that the new enactment (s. 62) clears up the difficulty, or at least it introduces a new one, when it says the judge shall decide all questions both of law and fact necessary for determining reasonable and probable cause. But can he (as under the former practice he could) have the assistance of a jury under s. 61?

The trend of the cases seems to shew that the judicial thought was that gradually the jury rather than the judge was being entrusted with the duty of passing upon the existence of reasonable and probable cause. And the legislature may have thought proper to settle the matter by passing s. 62. But has it done so? Or can judges still leave questions of fact relating to this particular issue to the jury? Sections 61 and 62 appear to be inconsistent.

It would be well to call attention to another notable change made by the Judicature Act of 1913 above referred to. By the Act of 1897 (R.S.O. c. 51, s. 112), all actions of slander, criminal conversation, seduction, malicious arrest, malicious prosecution or false imprisonment, were placed in the same class as actions

of libel. But now, not only malicious prosecution, but the other actions are taken out. This is a considerable change, the effect of which should be carefully considered.

ACTIONS ON FOREIGN JUDGMENTS.

The law as to foreign judgments has been much before the courts for many years, but, like many other subjects, cannot be said to be settled. Ever-varying facts open the door from time to time to differences of opinion which require judicial settlement.

In another column (p. 714) is the note of a judgment of a single judge in British Columbia (*Wanderers' Hockey Club* v. *Johnson*) reported in 14 D.L.R. 42. There is also a recent case in England (*Phillips* v. *Batho,* 135 L.T. Jour. 186) on the same subject. These cases give a text for a reference to the law discussed therein.

The plaintiff in the latter case claimed £7,200 against the defendant, being damages awarded to be paid by the defendant to the plaintiff by a judgment of the Bengal High Court in divorce proceedings in which the plaintiff was petitioner and the defendant co-respondent. The defendant replied that before the date when these proceedings commenced he had left India, and the court pronouncing the judgment had, therefore, no jurisdiction over him, and he was not bound by their judgment. The plaintiff was an Armenian Christian, born in Persia, who for thirty-three years had lived in British India, and who was domiciled there. He was married to his wife in British India. The defendant was a British subject domiciled in England, who resided in India for nineteen years before March 22, 1910, when he left India for England. On April 20, 1910, the plaintiff caused to be issued in the Bengal High Court a divorce petition against his wife, alleging her adultery with the defendant in India in 1909. The defendant was joined as co-respondent, and served with process by registered post in England. He did not appear; the wife defended. At the trial adultery was proved

and the defendant was condemned in £7,200 damages. The Indian Divorce Act, 1869, authorizes the Indian courts, where (*a*) the petitioner professes the Christian religion and resides in India at the time of presenting the petition, and (*b*) where the marriage shall have been solemnized in India—both of which conditions were fulfilled in the present case—to act and give relief on principles and rules as nearly as may be conformable to the principles on which the Divorce court in England gives relief. By s. 11 the petitioner is required to make the alleged adulterer a co-respondent; by s. 34 the husband may claim damages from the co-respondent; and by s. 50 the petition is to be served on any party to be affected thereby, either within or without British India, in such manner as the High Court shall direct. Rule 25 of Order V. of the High Court rules provides for the service by post of a summons on a defendant resident out of British India. For the plaintiff it was contended that the English court had jurisdiction to entertain the claim and give judgment for the plaintiff. For the defendant it was contended that the court had no jurisdiction; that the courts in England will give effect to the decree only if the parties were domiciled in the place where it was made; and that the decree in this case was separable into two parts, one a decree for the dissolution of the marriage and the other for the payment of a sum of money, and that in so far as it was a judgment for the payment of a sum of money it was merely in the position of the judgment of a foreign court in personam, which in the circumstances of this case could not be enforced in the courts of this country. The following, amongst other cases, were referred to: *Emanuel* v. *Symon*, 98 L.T.R. 304, [1908] 1 K.B. 302; *Rayment* v. *Rayment*, 103 L.T. Rep. 430, [1910] P. 271. Scrutton, J., gave judgment for the plaintiff, and held, that as the English courts will recognize and enforce the judgments as to status of the Indian courts in matters within their jurisdiction—marriage and the dissolution of marriage being matters of status—so they will also recognize and enforce the ancillary orders as to damages such as they themselves make in similar cases: *Phillips* v. *Batho*, 135 L.T. Jour. 186.

Mr. Justice Blackburn in *Schilsby* v. *Westenholz,* L.R. 6 Q.B. 155, 24 L.T.R. 93, says the true principle on which the judgments of foreign tribunals are enforced in England is that "the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce; and consequently anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action"; and in that case, where a judgment had been obtained in default of appearance in a foreign court against a defendant who at the time of the commencement of the suit was not a subject of, nor resident in, the country where the judgment was obtained, it was held that the plaintiff could not succeed here as there existed nothing imposing on the defendant any duty to obey the judgment. No territorial legislation can give jurisdiction which any foreign courts ought to recognize against absent foreigners, who owe no allegiance or obedience to the power which so legislates: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote,* [1894] A.C. 670. Lord Selborne in the *Faridkote* case says that the plaintiff "must sue in the court to which the defendant is subject at the time of the suit"; and again, "when the action is personal, the courts of the country in which the defendant resides have power, and they ought to be resorted to, to do justice."

In other words (as explained by Mr. Justice Scrutton in *Phillips* v. *Batho,* 135 L.T. Jour. 286), the English courts will not enforce a German judgment against an Englishman for damages for breach of contract to be performed in Germany, when the Englishman was not in Germany at the issue of the process and had not submitted to German jurisdiction, for the Englishman can be sued on the contract in his own courts, which will do justice.

These are principles upon which English courts will not enforce foreign judgments; is it possible to find positive rules upon which such judgments will be enforced? In *Rousillon* v. *Rousillon,* 42 L.T.R. 679, 14 Ch. D. 351, Mr. Justice Fry enumerates

five cases in which the courts of this country consider a defendant bound by a judgment obtained against him in a foreign court. There are (1) where he is a subject of the foreign country in which the judgment has been obtained; (2) where he was resident in the foreign country when the action began; (3) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4) where he has voluntarily appeared; (5) where he has voluntarily contracted to submit himself to the forum in which the judgment was obtained.

The English and Canadian authorities on actions on foreign judgments have been reviewed in an annotation in 9 D.L.R. 799, which it would be well to refer to in connection with the above.

THE CASE OF LARKIN.

There have been times in English history when such interference with the course of justice as has lately taken place in the City of Dublin would have caused the Minister responsible for it to lose, possibly not his head, but certainly his office.

It is not so now, for a Minister backed by a majority in the House of Commons may apparently do anything he pleases without remonstrance from a public which has become so lethargic through the blows dealt upon the constitution in recent years, that any action may pass without comment.

This man Larkin, an anarchist and a professional agitator, was recently convicted and sentenced to seven months' imprisonment, not for any interference with questions affecting trade unions but of sedition and of inciting to riots which might and actually did result in bloodshed. His conviction took place in an ordinary court of justice under the ordinary forms of law and presented no feature to justify executive clemency; yet, simply in obedience to the clamour of a mob, which for weeks had terrorized the city of Dublin, the executive remitted the very light sentence imposed upon him and liberated him from jail. The result of this action may easily be imagined and is already bringing forth fruit.

Whether this remission of sentence was due to cowardly dread of violence or to the desire to court popularity amongst a certain class, the result is equally disastrous. It is a matter of serious concern that in these days when anarchy is in the air, and riotous proceedings are of daily occurrence, the authority of the courts has been seriously weakened, and the administration of justice is brought into contempt. The disastrous lesson has been taught to those of the populous only too willing to learn it, that agitation carried on with sufficient violence and persistence is in time sure to gain its end.

This is not a question of politics, but appertains to the domain of law, the administration of justice and the enforcement of the court's decree. For a government to interfere with the action of the courts of law must always be an exceptional proceeding and more or less a danger to the state. Such interference under the circumstances connected with this trial and conviction cannot but weaken that which should be kept strong and firm. It will be fortunate if this incident, trifling as it may seem to some, does not lead to results of a most serious character.

A SUPREME APPELLATE COURT.

Whilst there will be divergent opinions as to the wisdom and practicability of the Judicial Committee of the Privy Council going on circuit to the over-seas Dominions, there will be few to differ from the views expressed by the *Law Times* in reference to the suggestion of Lord Haldane regarding the formation of our Supreme Appellate Court for the Empire. The writer believes that such a Court would prove very aeceptable to all lawyers throughout the King's dominions. He continues as follows:—

"It is an idea to which we have already adverted in these columns, for, as we have pointed out, although in theory appeals from the United Kingdom go to the King in Parliament and appeals from beyond the seas to the King in Council, the personnel of those tribunals is more or less identical. We have

little doubt that if and when a reorganisation of the House of Lords is brought about, that will prove an opportune time for the establishment of the new court of final appeal, and that its nucleus will be found in the existing Judicial Committee of the Privy Council. A tribunal of this description, enlarged perhaps and sitting in more than one division, upon which all those who have to administer the systems of law that obtain throughout the Empire are represented, would be a truly actual and living Imperial Court of Appeal."

EXAMINATION OF BANK PASS-BOOKS.

Lord Halsbury, L.C., made it fairly clear in delivering his opinion in the historic case of *Bank of England* v. *Vagliano,* 64 L.T. Rep. 353, at p. 356, (1891), A.C. 107, that, so far as his view was concerned, a customer of a bank was "bound to know the contents of his own pass-book." That expression of his Lordship, however, followed almost immediately after a previous statement of his that he did not dispute the proposition that "the carelessness of the customer or neglect of the customer to take precatuions unconnected with the act itself cannot be put forward by the banker as justifying his own default." Is the omission of a customer to examine, and make himself fully acquainted with, the contents of his pass-book carelessness or neglect so "unconnected with the act itself" as not to preclude him from recovering from the bank amounts paid in respect of cheques, the signatures to which were forged, although such cheques were debited to his account in the pass-book? An affirmative answer to that question is of such prime importance to a vast number of persons—for everyone who possess a banking account runs the risk of the forgery of his signature to a cheque—that it may well be anxiously sought for. And it is to be obtained from the judgment of Mr. Justice Channell in the recent case of *Walker* v. *Manchester and Liverpool District Banking Company, Limited,* 108 L.T. Rep. 728. The learned judge gave it as his opinion

that "the authorities were rather against the contention that there is a duty on the part of the customer to examine his pass-book." The observations of Lord Esher in *Chatterton* v. *London and County Bank,* referred to in Paget on the Law of Banking, 2nd ed., pp. 156-160, assist in that conclusion. And later on his Lordship said that if the customer got his pass-book, and examined it so carelessly that he did not discover a fraud, still he would not be bound by payments made by the bank. In his opinion, the case before him was identical to all intents and purposes with *Kepitigalla Rubber Estates, Limited* v. *National Bank of India, Limited,* 100 L.T. Rep. 516, (1909), 2 K.B. 1010. Turning to our report of that case, it is seen that the head-note contains this proposition of law, deduced from the judgment of Mr. Justice Bray: "Where a bank pays money upon forged cheques, it is liable to the customer, unless it can be shewn that the customer's negligence is immediately connected with the transaction itself, and the proximate cause of the loss." That, it will be observed, coincides precisely with what was laid down by Lord Halsbury, L.C., in *Bank of England* v. *Vagliano* (ubi sup.). Mr. Justice Bray referred also to *Swan* v. *North British Australian Company,* 2 H. & C. 175; *Bank of Ireland* v. *Trustees of Evans' Charities,* 5 H. of L. Cas. 389; *Mayor, etc.* v. *Bank of England,* 56 L.T. Rep. 665, 21 Q.B. Div. 160, and *Lewes, etc., Company* v. *Barclay and Co., Limited,* 95 L.T. Rep. 444, 11 Com. Cas. 255, as supporting his statement of the law. The mere fact that a customer of a bank takes his pass-book out of the bank and returns it without objecting to any of the entries contained therein, there being a pencil entry of the balance, did not, in the opinion of his Lordship, amount to a settlement of account as between the customer and the bank in respect of those entries. In America there appears to be a somewhat different view entertained of the rights of customer and bank in this respect, judging from the decision in *Leather Manufacturers' Bank* v. *Morgan,* 117 U.S. Rep. 96, at p. 116. It seems that a customer is bound in the United States to examine the entries in his pass-book when he receives it, and to report any errors

in it. If he fails to do so, and the bank is thereby misled to his prejudice, he cannot afterwards dispute the correctness of the balance shewn by the pass-book. The rigour of that pronouncement of the law is, however, most unlikely to find favour in this country. Customers of banks are not all people blest with punctilious business instincts and habits.—*Law Times.*

DICTA ET PROMISSA IN THE CIVIL LAW AND UNDER MODERN CODES.

A question that very often is put before the courts for decision is: What are the remedies of a purchaser, when his seller delivers a thing not according to contract? We refer in this to sales of individual things and not to things generic.

The question is complicated and involves a number of others. First there is the question: When is the thing defective? In other words, is the seller liable for so-called defects in abstracto (lack of qualities usual with such things) or for defects in concreto only (lack of qualities guaranteed or assumed to exist in the thing sold)? As a general rule, it may be said that the seller of an individual thing will not incur liability in damages for defects in abstracto; the only consequences of such defective delivery will be that the purchaser can cancel the contract; or demand an abatement in the price; this latter is often called damages, but this appears to be a very loose use of the word.

Then, there is the question: Can the purchaser claim from the seller (as the Germans would say) his positive interest in the contract, that is, can he claim the profits he would have made, or can he claim his negative interest only: to be put in the same position, as if the contract had not been entered into?

But the main question is: Is the seller liable for fraud only (dolus) or can he also be held responsible for negligence (culpa)?

We generally follow the Civil Law rule, as it has been uniformly interpreted for centuries: That only fraud will make the seller liable in damages. The Civilians found their rule, that

nothing less than dolus will sustain an action for damages, upon the sharp distinction made between venditor sciens and venditor ignorans.[1] Against venditor ignorans the purchaser has no other actions than those founded upon the Edict of the Aedils (actio redhibitoria and actio quanti minoris) while against venditor sciens he has actio epti, by which he can enforce damages (quanti emptoris interfuit non decipi.)[2]

Of late, however, some of the German civilians have commenced to question this doctrine.[3] They call attention to such statements as the following by Ulpian in fr. 13, sec. 3, D. 19-1, "sed non debuit facile quae ignorabat asseverare," and again, "non debuit facilis esse ad temerariam indicationem."[4]

In addition to fraud, the civil law makes the seller liable in damages for "dicta et promissa," and it does not make any difference whether the dicta et promissa were made fraudulently or negligently. This is probably what Ulpian meant; he warns the seller that, while ordinarily he is liable for fraud only, he will have to be careful, not to make frivolous assertions, as they may be held against him as dicta sive promissa.

We can, then, repeat our former statement that the rule followed by our courts is practically the same as that of the civil law, viz.: The seller becomes liable in damages only, when he has been guilty of fraud, or has guaranteed the thing. This appears so well settled that no citing of authorities is required. But this rule has, never and nowhere, worked quite satisfactorily.

For this there appears to be several reasons, but the principal one seems to spring from the various translations of the Latin words, dolus and culpa. In civil law the meaning of both of

1. Fr. 13, pr.; fr. 1, sec. 14, D. 19-1.

2. Fr. 13, sec. 1, D. 19-1.

3. See f. inst. F. Leonhard: "Die Haftung des Verkaufers fur sein Verschulden beim Vertragsschlusse" (1896) and "Verschulden beim Vertragsschlusse" (1910). Von Bluhme and Krueckman appear to agree, more or less, with Leonhard.

4. See also fr. 45, sec. 4, D. 18-1; fr. 6, sec. 4, D. 19-1; fr. 19, sec. 1, D. 19-2.

these words had become entirely technical, and they had acquired various technical meanings. Dolus was used in the law of contracts for what we call fraud, and likewise in criminal law for malice. In the popular language, dolus retained the meaning of fraud, and in translating contract-dolus we used the English word for its original and popular meaning, whereby its acquired technical meaning was mainly lost; culpa we treated in the opposite way, disregarded its original meaning of guilt and adopted its acquired technical meaning of negligence. As we also adopted the word fraud as the technical name for certain criminal acts, we have become apt to apply a too strict interpretation to dolus, with a correlative too expansive interpretation of culpa. The Germans have suffered somewhat in the same manner. It is true that in civil matters, they have two words for what we call fraud, Vorätz and Arglist, which try to differentiate degrees of fraud, but still, both words imply intentional misrepresentation. On the other hand, both Unachtsamkeit and Nachlässigkeit, just as negligence, imply principally carelessness.

That fraud must carry with it responsibility in damages, appears self-evident; equally plain it is that mere carelessness cannot lead to any further duty than that of restitution. But there is, without doubt, a wide hiatus between intentional fraud and mere carelessness. In practical life, this must be bridged over, and it is quite natural, and in accordance with the rule (in dubio pro mitius), that negligence has been expanded to have an altogether too wide technical meaning.

In the modern legislation of various countries, attempts have been made to cover cases, not fraudulent, nor arising from simple carelessness, and to some extent place them on the same footing with fraudulent cases.

The German Civil Code[5] says: Fehlt der verkaufte Sache zur Zeit des Kaufes eine zugesicherte Eigenschart, so kann der Kaüfer, statt der Wandlung oder der Minderung, Schadenersatz wegen Nichterfüllung verlangen . . .'' (If, at the time of

5. (DBGB) sec. 463.

the purchase, the thing sold lacks a certain quality which has been assured, then the purchaser may, in place of abrogation or abatement in the price, demand damages for non-compliance).

The Uniform Scandinavian Laws[6] have the same rule, except that instead of the words, "eine zugesicherte Eigenschaft," they use the words, "Egenskaber som maa anses tilsikrede" (qualities which must be considered to have been assured).

It is rather difficult to give the exact meaning of these words in English. We call attention to the fact that the words "garantiert" and "garanteret" have not been used, and these words were left out advisedly and replaced by the word "zugesichert" and "tilsikret." Literally, these words mean assured, and that with us practically means the same as guaranteed. Still, by the expressions used, it was, without any doubt whatever, intended to cover such cases, where there was no actual guarantee, nor any actual fraud, but still such action on the part of the seller, that he ought not to be heard with the plea that he had simply been careless.

From the day when the German Civil Code was promulgated, yes, from the time it was under preparation and under debate in the Reichstag, the above cited section has been a battlefield, where one-half of the German law-writers, the Reichsgericht and its various "Senaten," all of the German Superior Courts and a number of non-German writers have waged an endless war. The USLK have not been in operation long enough to bring disputes over their corresponding section to decision before any of the supreme courts, but all of the law-writers of the three countries are constantly trying to find the exact meaning of the section.

No agreement has been reached. Judge Riehl, of Berlin, has even as late as in the Deutsche Juristen Zeitung for March 15, 1913, expressed the opinion that when the thing sold is real estate, not even "Arglist" will justify a judgment for damages. But the tendency seems to be towards the opinion that the

6. "Om Kob" (About Purchases) (USLK) sec. 42-II.

words, "zugesicherte Eigenschaft" and "Egenskaber som maa anses tilsikrede" intend to cover the same ground as the Roman dicta et promissa.

Then it becomes necessary, however, to give to these words a somewhat more liberal construction than has hitherto prevailed. In this connection, it may be worth noting that these words often appear as "dicta sive promissa," in other words, they form not one technical expression, but there is a difference between the two words and their meaning. Promissa will cover what we understand by guarantees. What, then, does dicta cover? Our answer, and what would appear as a reasonable and practical one, and in accordance with Ulpian's sayings, is this: Mere general praise of the thing you wish to sell is not dicta. But if you mention special qualities in the thing, as if you had personal knowledge of them, and the purchaser has reason to believe that you have such personal knowledge, such representations on your part are dicta, even when you do not guarantee the qualities, and even when your representations are made in good faith. When the seller holds himself out as speaking of his own knowledge, he should not afterwards be heard with the dfence "caveat emptor." Especially is this the case since, in most sales of individual things, the seller is more or less of an expert in the line in question, while the purchaser generally is an ordinary man off the street.—*Central Law Journal.*

Correspondence.

PRIVY COUNCIL GOING ON CIRCUIT.

To the Editor, CANADA LAW JOURNAL:

DEAR SIR,—A cable despatch states that a suggestion comes from Lord Chancellor Haldane to the effect that he, as head of the judiciary has in contemplation a radical change in the administration of justice in regard to the final Court of Appeal for the Empire over the sea. It is nothing less than that the Lords of the Judicial Committee of the Privy Council should go on circuit amongst some at least of the outlying countries which form parts of Greater Britain. The Lord Chancellor has just returned from his visit to Canada and has seen things, and perhaps broadened his outlook.

The suggestion (for at present it cannot well be more) is in itself significant of a growing Imperialistic sentiment, but it is larger than it would appear at a first glance. Whether it is practical is a question which must be determined by the Imperial Government and the advisers of His Majesty the King, who accepts their humble but wise advice in dispensing justice to those who crave it from him at the foot of the Throne. If practicable his subjects of the over seas dominions would, we believe, welcome a change which would draw closer the bonds of Empire unity.

At first blush one can see difficulties as well as possible advantages. Presumably the expense of appeals would be lessened. The number of appeals to His Majesty would certainly be increased, and the business in our Supreme Court decrease. Comparisons are odious, but even the judges of that court would all admit that the highest class of judicial minds must almost of necessity be found where the largest field of choice exists, and where the training is of a higher order than is possible in the younger countries. Whilst we are vigorous, we are as yet in our minority, and immature as compared with the mother country and have much to learn in many matters.

Then again there are those who think that some personal knowledge by judges of the country where the events occurred would tend to produce more satisfactory findings. I know, however, that your journal takes no stock in this suggestion.

Those of our Bar who have visited the unpretentious chamber where the Judicial Committee does its work will have there wit-

nessed the careful attention of its members to the arguments adduced, their keen and intelligent interest in all that is brought before them, their quiet patience and their gentle courtesy to those who come before them. The example of such men would be most beneficial to the Bench and Bar in the younger countries of the Empire.

ONLOOKER.

[It is too soon, and our information is too scant to discuss what after all may have been but a passing thought in the mind of Lord Haldane. When the suggestion takes more definite shape if it ever does it can be discussed more intelligently. In the meantime, though it may sound inviting, we doubt both its wisdom or its practicability.—ED. C.L.J.]

THE LATE JAMES S. CARTWRIGHT, K.C., MASTER IN CHAMBERS.

To the Editor OF THE CANADA LAW JOURNAL:

DEAR SIR,—There is not a member of the legal profession who does not deplore the death of the late James S. Cartwright, K.C., Master in Chambers, the student's best friend and the lawyer's admiration. In the course of the many heated arguments which took place before him he had the happy faculty of satisfying counsel engaged therein by judgments of which in the end they approved. He was always urbane, never unkind, sympathetic and possessed of remarkable wisdom. He trusted the profession; they reciprocated. It was great pleasure to argue cases before him; he was so patient and still appreciative. The younger members of the bar could not help but love him, never discourteous, always the gentleman, possessed not only of a legal education, but of a literary one. His judgments were short, to the point, sound and almost always to the satisfaction of the legal profession.

It will be hard to find any member of the profession who can fill his place. He was neither narrow, stubborn or egotistic, but broad, appreciative and humble. We shall all feel keenly his absence from us, and a fitting memorial to him should be placed in Osgoode Hall.

A MEMBER OF THE PROFESSION.

[We refer in another place (page 714) to the loss the profession has sustained by Mr. Cartwright's death.—ED. C.L.J.]

REPORTS AND NOTES OF CASES.

England.

JUDICIAL COMMITTEE OF PRIVY COUNCIL.

Lords Atkinson, Shaw, and Moulton.] [13 D.L.R. 900.

JONES *v.* CANADIAN PACIFIC RY. CO.

1. *Master and servant—Employer's liability—Statutory duty—Railway employees passing test.*

Where a railway company in breach of the duty imposed by Order No. 12225 of the Railway Commissioners of Canada, permits an employee to engage in the operation of trains without the specified examination and test, the company is, by virtue of sec. 427 of the Railway Act, R.S.C. 1906, liable in damages to any person injured as a result of such breach of duty. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed; see also Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, R.S.O. 1914, c. 146; and Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, amending R.S.O. 1897, c. 166, R.S.O. 1914, c. 151.

2. *Common employment—Master's breach of duty.*

The defence of common employment is not available to the master in a case in which injury has been caused to a servant by the negligence of a fellow-servant selected by the master in breach of a statutory duty to employ in the particular service only persons who have passed a qualifying test, if the injury be the natural consequence of the lack of capability which the test should have disclosed. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, reversed; *Groves* v. *Wimborne*, [1898] 2 Q.B. 402, applied.

3. *Evidence—Presumptions and burden of proof—As to skill—Railroad employees.*

The flagrant failure of a section foreman improperly entrusted with the charge of a railway snow-plow train in violation of statutory regulations requiring that only employees should be placed in charge who had passed the prescribed examination to observe the signals or to signal to the engine driver

in rear may, in the absence of evidence to the contrary, be presumed to have resulted from his want of skill, knowledge or experience, or to some physical incapacity or defect, which the statutory examination or test would have revealed; and the railway company is properly held liable in damages for the death of his assistant on the snow-plow in a collision resulting from the section foreman's neglect in which he also was killed; the company's action in setting an unqualified man to do such work was either the sole effective cause of the accident or a cause materially contributing to it, and the case therefore could not have been properly withdrawn from the jury. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, 3 O.W.N. 1404, reversed.

4. *New trial—Instructions—Reading charge as a whole—Misdirection.*

The judge's charge to the jury is to be read as a whole, and if in view of its general meaning and effect, the jury were not left under any erroneous impression as to the real nature of the issues to be determined or as to the law applicable, misdirection cannot be predicted upon an isolated portion of the charge when read apart from the other portions, so as to constitute a ground for ordering a new trial. *Jones* v. *Canadian Pacific R. Co.*, 5 D.L.R. 332, reversed.

Sir Geo. Gibbons, K.C., and *Geo. S. Gibbons*, for appellant. *Sir Robert Finlay*, K.C., *Angus MacMurchy*, K.C., and *Geoffrey Lawrence*, for the Railway Co.

Dominion of Canada.

EXCHEQUER COURT.

THE KING *v.* BRADBURN & WEBB.

Cassels, J.] [Aug. 29.

Public harbour—Navigable waters—Water lots — Set-off — Increased value of remaining lands by reason of public work.

Proceedings by the Crown for the expropriation of certain lands bordering on the Kaministiquia River at Fort William

were taken with a view to the widening of the channel of the river. In carrying out the works, a road-allowance which intervened between the lands taken and the water of the river was expropriated, leaving the lands with a frontage on the river subsequently widened.

Held, 1. The advantage to the balance of the lands equalize any damage to the land owners over and above the amounts offered as compensation by the government.

Water lots had been granted after Confederation in the river by the Province of Ontario. The question arose as to the compensation to be paid for these water lots.

Held, 2. The waters of the river are navigable waters within the statute (R.S. 1906, c. 115) from bank to bank, and that these water lots could not be built upon by the owners thereof without the assent of the Dominion authorities.

The contention was raised on the part of the Crown that the waters in question formed part of a public harbour as defined by the Confederation Act.

Held, 3. That upon the facts they did not form part of such public harbour.

Dowler, K.C., and *W. S. Edwards,* for plaintiff. *Pitblado,* K.C., and *F. R. Morris,* for defendants.

Province of Ontario.

SUPREME COURT—APPELLATE DIVISION.

Mulock, C.J.Ex., Clute, Riddell, Sutherland, JJ.] [13 D.L.R. 836.

SPENCER *v.* CANADIAN PACIFIC R. Co.

Carriers—Baggage or property of passenger—Limitation of liability for loss—Condition on back of check—Want of notice.

A passenger who checks his baggage on a ticket previously purchased is not bound by a condition printed on the check but not on the ticket, limiting the liability of the carrier in case of loss, where such condition was not brought to the notice of the passenger, and the circumstances disclosed no assent either actual or constructive to such condition by the passenger.

Lamont v. *Canadian Transfer Co.*, 19 O.L.R. 291, considered.

Shirley Denison, K.C., and *C. W. Livingston*, for the appellant company. *J. W. Bain*, K.C., for plaintiff.

Meredith, C.J.O., Maclaren, Magee, Hodgins, JJ.A.] [13 D.L.R. 854.

RE KETCHESON AND CANADIAN NORTHERN ONTARIO RY. CO.

1. *Damages—Depreciation—Eminent domain—Railway right-of-way across farm.*

The loss of time and inconvenience of transporting the crop from the part of the farm separated from the buildings by the construction of the railway on a compulsory taking of a strip of land for the right-of-way, is proper to be considered in estimating the damages only in so far as it affects a depreciation of the market value of the land not taken: *Idaho and W.R. Co.* v. *Coey*, 131 Pac. Rep. 810, approved.

2 *Damages—Eminent domain—Cultivating farm crossed by railway.*

In awarding damages against the railway in eminent domain proceedings in respect of a railway right-of-way across a farm, the inconvenience of transferring machinery and farm implements, and the like, from one part of the farm to another and the inconvenience in farming and cultivating the land, occasioned by the construction of the railroad, are not separate items to be capitalised on an ascertainment of a prospective annual loss to the owner whose farm is divided, but are to be considered only as factors in fixing the depreciation of the market value of the remaining parts of the farm.

3. *Interest on awards.*

Interest on the sum awarded as compensation as of the date of the deposit of the plan and profile, should not be given by arbitrators as a part of their award for land expropriated for railway purposes, and will be struck out as beyond their jurisdiction; the right to interest from that date is conferred under the Railway Act (Can.) and not left to be determined by the arbitrators: *Re Clarke and Toronto Grey & Bruce R. Co.*, 18 O.L.R. 628, referred to; *Re Davies and James Bay R. Co.*, 20 O.L.R. 534, considered.

4 *Appeal from award—Review of facts.*

The appellate court, on an appeal from an award in eminent domain proceedings, should come to its own conclusion upon all the evidence, paying due regard to the award and findings and reviewing them as it would those of a subordinate court: *James Bay R. Co.* v. *Armstrong,* [1909] A.C. 624, referred to.

On an appeal from an award, the latter will not be set aside merely because the appellate court disagrees with the reasoning of the arbitrators, but will stand if it can be supported on any ground sufficient in law.

5. *Evidence—Relevancy—Similar facts.*

Evidence of settlements made by the railway with other persons for parts of other farms taken for the right-of-way is not relevant in expropriation proceedings under the Railway Act (Can.).

6. *Evidence—Declarations and acts of party—Payments in other cases of expropriation—Fixing values.*

The fact that one party to the issue presented on an arbitration is allowed to give evidence of a class which is not relevant, does not entitle the opposing party to answer with the same kind of irrelevant testimony; and the opposing party, although successful in the issue is properly refused costs of his irrelevant evidence: *R.* v. *Cargill,* [1913] 2 K.B. 271, applied.

W. C. Mikel, K.C., for company. *I. F. Hellmuth,* K.C., and *E. G. Porter,* K.C., for claimants.

Meredith, C.J.O., Maclaren, Magee, Hodgins, JJ.A.] [13 D.L.R. 884.

EGAN *v.* TOWNSHIP OF SALTFLEET.

Highways—Defects—Injury to traveller—Liability—Notice of injury.

In the absence of a reasonable excuse for the plaintiff's failure to give to a municipality notice of injuries sustained on a defective highway, in the manner required by sec. 606 (3) of the Ontario Consolidated Municipal Act, 1903, R.S.O. 1914, ch. 192, the want of notice, although not prejudicial to the municipality, is a full defence to an action for damages.

W. A. Logie, for plaintiff. *F. F. Treleaven*, for defendant corporation.

ANNOTATION ON THE ABOVE CASE.

There is a constantly increasing class of negligence cases under statutes imposing liability for damage on municipalities and on employers in which a condition precedent to a right of action is the service of notice of accident, or of claim. The statute provides in some of the provinces (such as originally in Ontario) for notice of the accident; in others (as Manitoba) for notice of claim.

Sec. 606 of the Consolidated Municipal Act (Ont.) 1903, provided for notice of "the accident and the cause thereof," but sec. 460 of the Municipal Act (Ont.) 1913, amends by requiring notice of "claim and of the injury complained of" (R.S.O. 1914, ch. 192). Sub-sec. 5 of sec. 606 of the 1903 Act dispenses with the notice (*a*) in cases where death ensues and (*b*) in all other cases (except snow and ice sidewalk claims) where the Court "considers" (1) that there is "reasonable excuse," and (2) that the defendants have not been "prejudiced in their defence"; but sec. 460 of the Act of 1913 substitutes the phrase "is of the opinion" for the word "considers."

Sec. 13 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160 (R.S.O. 1914, ch. 146), into which the notice provision is carried dispenses in sub-sec. 5 of sec. 13 with the notice where "in the opinion" of the Court (trial or appellate) (1) there was "reasonable excuse," and (2) there was "no prejudice to the defendant in his defence."

The Manitoba Municipal Act, R.S.M. 1902, ch. 116, sec. 667, provides for notice of "claim or action."

It will be noted that the Manitoba Act prescribes the period for notice not "30 days" but "one month."

This kind of notice (unknown to common law negligence) is of modern origin dating back only to the year 1892 in Ontario, Boyd, C., in *Longbottom* v. *Toronto* (1895), 27 O.R. 198, at 199, and Meredith, J., in *O'Connor* v. *Hamilton* (1904), 8 O.L.R. 391 at 401, taken jointly, are to the effect that the enactment as to highways was introduced in 1894 by 57 Vict. (Ont.) ch. 50, sec. 13, carried with certain amendments into sec. 606 of the Consolidated Municipal Act, 1903, 3 Edw. VII. (Ont.) ch. 19, the idea being probably taken from the Workmen's Compensation for Injuries Act of 1892, 55 Vict. (Ont.) ch. 30, borrowed from the Imperial enactment respecting employers' liability.

The reason for the notice is to give the defendant a chance at once to examine the scene of the accident and to see witnesses; or, as put by Boyd, C., in the Longbottom case, to give an opportunity of investigating the matter in all its bearings with the view to settling or contesting the claim. An analysis of those reasons is embraced in the dissenting judgment of Meredith, J., in *O'Connor* v. *Hamilton* (1904), 8 O.L.R. 391 at 402, 403, 404.

A notice to municipalities in Ontario was prior to 1894 not necessary, then a 30-day notice was prescribed for all municipalities, followed in 1896 by limiting the urban notices to 7 days.

In 1899 the need of further legislation to cover cases of joint municipal liability is emphasized in *Leizert* v. *Matilda Township*, 26 A.R. (Ont.) 1. The legislation followed in 62 Vict. (Ont.) ch. 26, sec. 39, carried into sec. 606 of Consolidated Municipal Act, 1903, and sec. 460 of the Municipal Act of 1913 [R.S.O. 1914, ch. 192].

It appearing that, in negligence cases of the classes indicated, the notice of the accident prescribed by statute is, to give the defendant a chance to examine the scene of the accident, and to make an immediate and intelligent inquiry into its cause, and so that dishonest claims, or those entirely without legal basis, may be effectively met, and valid claims settled or properly contested; it will be perceived that "ice and snow" sidewalk claims are a striking illustration of the fairness and common sense of speedy notice of accident to induce an inspection before the evidence varies or disappears.

Speaking generally this kind of notice is a condition precedent to the statutory right of action. In this connection Boyd, C., in *Longbottom* v. *Toronto*, 27 A.R. 198 at 199, reads the original enactment touching sidewalks thus: "The notice required by 57 Vict. (Ont.) ch. 50, sec. 13, in cases of injury from defective sidewalks is to inform the corporation before action of the nature of the accident and the cause of it."

The law-maker having wisely provided for notice of the accident to protect the defendant, has with commenable prudence begun to provide for the numberless cases where the want of notice is to be excused to protect the plaintiff. The law of excuse for want of notice evolves slowly and cautiously. A definition will probably be attempted by express statutory enactment in some future Act. In *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560 at 568, cited in *O'Connor* v. *Hamilton* (1905), 10 O.L.R. 529 at 536, it was said: "What may constitute reasonable excuse for not giving notice is not defined and must depend very much upon the circumstances of the particular case."

In *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560, a case under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, sec. 9, it was held that what constitutes reasonable excuse must depend upon the circumstances of each particular case and that such may be inferred where there is (1) notoriety of the accident; (2) employer's knowledge of (*a*) the injury, and (*b*) its cause; (3) employer's holding up the claim for a promised settlement.

In the *Armstrong* case, 4 O.L.R. 560 at 568, the governing principle is laid down as follows. "Reasonable excuse for want of notice may be very slight indeed where the occurrence of the accident appears to have been well known to the employer, and a *bonâ fide* claim for compensation therefor has been made, inasmuch as the Judge has power under sec. 14 in the alternative, and simply in his discretion and on such terms as he may think proper, to adjourn the trial of the action to enable notice to be given."

In following the history of notice of accident as a condition precedent to right of action, it is seen that while the original intention of the legislature was to protect the municipality or the employer from stale or unjust claims, it soon became evident that the plaintiff also needed help. This was sought to be afforded by certain amendments empowering the Courts to relieve from want or insufficiency of notice in actions where it appeared (*a*) that there was "reasonable excuse" for the failure to give the prescribed written notice, and (*b*) that the defendant had not been prejudiced by such failure.

Courts experience some difficulty in determining when the sufficiency of want of notice of accident does not "prejudice" the defendant. But this difficulty wanes to a vanishing point compared with the vexed question of "reasonable excuse."

Again, a knotty question for the Courts is whether the plaintiff, having proved reasonable excuse (whatever that is), still bears the onus of proving no prejudice. The vague nature of "reasonable excuse" leaves it doubtful in many cases whether the term necessarily includes "no prejudice," while in many other cases the dividing line is obvious. The unique severity of the provision requiring notice of accident without a liberal interpretation of "reasonable excuse" is emphasized by Anglin, J., in *O'Connor* v. *Hamilton* (1904), 9 O.L.R. 391, at 396 as follows: "The legislation in question is so drastic, the limitation imposed, unless a very liberal interpretation be given to the saving provision, is so little short of prohibitive and must so often prove destructive of most meritorious claims, that (speaking for myself) I do not hesitate to say that where there has been no prejudice to the defendants I shall strive to find in the circumstance something, however slight, which may serve as a reasonable excuse."

Meredith, J., dissenting, at pages 399 and 400 intimates that the function of the Court is not one of discretion but strictly to try and adjudicate (like other questions of law and fact in the case) whether there is (*a*) reasonable excuse, and (*b*) no prejudice; and he adds that the subject is not one of mere practice, to which the exercise of discretion may be appropriate, but is one of a civil right, to be sustained or lost finally by the judgment upon the question.

The difficulty seems to be that the Courts are loath to apply a too liberal construction to "reasonable excuse" while the law-maker hesitates to define it. The Ontario Supreme Court (Appellate Division) in a unanimous judgment, *Egan* v. *Saltfleet*, 13 D.L.R. 884, *supra*, delivered by Meredith, C.J.O., addresses the following suggestion to the law-maker: "I cannot refrain from expressing my regret that the legislature has not seen fit to dispense with the necessity of shewing reasonable excuse for the want of notice. I see no reason why the want of it should bar the right to recover where it is shewn that the corporation has not been prejudiced by the notice not having been given within the prescribed time."

The judgment of the Ontario Court of Appeal in *O'Connor* v. *Hamilton* (1902), 10 O.L.R. 529, went off on another ground, yet that decision, which

was unanimous, lays down sufficient to justify the judicial suggestion for further law making. Osler, J., at page 536 (after citing *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560, for the principle that what constitutes reasonable excuse is not defined and depends on circumstances) adds in effect that it not easy to lay down a general governing principle and that where there are actual knowledge and verbal notice, as elements of excuse, there still remain questions of great nicety.

Some of the cases in different provinces, illustrating the difficulties and perplexities experienced by the various Courts in the different law districts of Canada because "reasonable excuse" has never been defined, are subjoined.

The failure of an employee to give notice of an injury within the time prescribed by sec. 4 of the Alberta Workmen's Compensation Act of 1908, ch. 12, is not fatal, unless the omission is prejudicial to the employer: *Bruno* v. *International Coal & Coke Co.*, 12 D.L.R. 745.

The employee's ignorance of the fact that he was entitled to compensation for injuries is not a mistake that will excuse his failure to give notice thereof in the manner required by sec. 4 of the Alberta Workmen's Compensation Act of 1908, ch. 12: *Bruno* v. *International Coal & Coke Co.*, 12 D.L.R. 745.

A notice of injury given by a workman is sufficient to entitle his dependants after his death to the benefits of the B.C. Workmen's Compensation Act, R.S.B.C. 1911, ch. 244, without any other or further notice: *Moffatt* v. *Crow's Nest Pass Coal Co.*, 12 D.L.R. 643.

The statute in Quebec requiring notice of action against a municipal corporation was not enacted to allow corporations to escape liability on technical grounds, but to enable them by investigation to come into possession of all the facts, so as to either compromise or properly prepare the defence: *West* v. *City of Montreal*, 9 D.L.R. 9.

An action brought against a municipality for personal injuries from negligence in the operations under way for making repairs to its streets, but not due to any defect in the condition of the street itself, is not within the Ontario Municipal Act, 3 Edw. VII. (Ont.) ch. 19, sec. 606, so as to require a preliminary notice of injury: *Waller* v. *Town of Sarnia*, 9 D.L.R. 834.

Where a statutory enactment in Quebec required notice of suit to be given to a city corporation before an action in damages could be instituted, such notice in the absence of any contrary stipulation may be given by the plaintiff's attorney and may be validly served by bailiff: *City of Westmount* v. *Hicks*, 8 D.L.R. 488.

A defective notice, or even no notice at all, in British Columbia is not a bar to action if it is proved (*a*) that the employer is not prejudiced in his defence, or (*b*) that the want or defect was occasioned by a mistake or other reasonable cause: *Mitchelli* v. *Crow's Nest Pass Coal Co.*, 7 D.L.R. 904 at 907.

Where in British Columbia the injured party was laid up with the

accident in a serious illness, his inability to give the notice is construed liberally in his favour on the general principle that such a condition indisposes a man to do any business: *Lever* v. *McArthur*, 9 B.C.R. 417 at 420.

Where in British Columbia there has been a genuine mistake, not of law, that is, as to the legal effect of the doctor's certificates in a mining district, but of fact, that is, as to whether or not the company would accept them as a notice of injury, the custom and usage will be considered on the question as to whether the plaintiff was misled thereby from giving the statutory notice: *Michelli* v. *Crow's Nest Pass Coal & Coke Co.*, 7 D.L.R. 904 at 909.

In Quebec the failure to give notice to the municipality of an injury sustained on a defective sidewalk (without reasonable excuse) will bar the action not only against the municipality but also against the property owner who is answerable to the municipality under art. 5641 of the Cities and Towns Act, R.S.Q. 1909: *Batsford* v. *Laurentian Paper Co.*, 5 D.L.R. 306.

The notice of action required by sec. 667 of the Manitoba Municipal Act, R.S.M. 1902, ch. 116, need not be signed by the claimant personally nor need it shew that he was claiming in his capacity of personal representative of the deceased: *Curle* v. *Brandon*, 15 Man. L.R. 122.

Sec. 722 of the Winnipeg charter which is the same in effect as sec. 667 of the Manitoba Municipal Act. R.S.M. 1902, ch. 116, requiring notice of the "claim or action," is to receive a liberal construction, and requirements not specifically stated and not necessarily implied should not be read into it: *Iveson* v. *Winnipeg*, 16 Man. L.R. 352.

When plaintiff proves that he has given the notice of action required by the Municipal Code (Que.), the failure to allege notice in his declaration is not a cause of prejudice to the defendant and not a ground for exception to the form: *Pageot* v. *St. Ambroise*, 10 Que. P.R. 79.

A notice by letter to the chairman of the Board of Works, instead of to the city clerk, under sec. 722 of the Winnipeg charter, 1 and 2 Edw. VII. (Man.) ch. 77, which contained full particulars of the accident and of the injuries and of a claim for a specific sum and which reached the city clerk within the prescribed time, was held sufficient: *Mitchell* v. *Winnipeg*, 17 Man. L.R. 166.

Notice to be excused must be based on more than mere want of prejudice: *Anderson* v. *Toronto*, 15 O.L.R. 643.

In Quebec the right of action for damages against a city being based primarily on the sufficiency of the notice as to the place where the accident occurred according to art. 536(*a*) of the Montreal charter, a notice stating that the accident occurred on a sidewalk on the corner of two streets, while it appears by the evidence that the plaintiff fell on the crossing between these two streets, is insufficient: *Seybold* v. *City of Montreal*, 10 Que. P.R. 377.

In an action in Ontario against a township corporation for damages for personal injuries from a highway out of repair, where the plaintiff gave

notice in writing of the "accident and the cause thereof" under the Consolidated Municipal Act, 1903, sec. 606, within the proper time, but did not state therein the precise part of the highway which was out of repair, the notice was held sufficient as affording reasonable information to enable the defendant to investigate, it appearing that the municipality knew the place of the accident and had in fact investigated, on the principle that the Court should not add anything to that which is expressly prescribed by the statute: *Young* v. *Township of Bruce*, 24 O.L.R. 546.

In an action against a rural municipality in Ontario where (*a*) the municipality was notified verbally by the plaintiff's employer of the happening of the accident, (*b*) the plaintiff for part of the period was not in a condition to give the notice, (*c*) the plaintiff was ignorant of the law requiring the notice; such reasons do not constitute a reasonable excuse for want of notice: *Egan* v. *Township of Saltfleet*, 13 D.L.R. 884, *supra*.

Where want of notice was pleaded by the defendant the following excuses were held sufficient: (1) notoriety of the accident, (2) defendant's knowledge of it, (3) defendant's knowledge that plaintiff's representative was making the claim, (4) defendant taking the claim into consideration but never giving plaintiff a final answer as to settlement: *Armstrong* v. *Canada Atlantic R. Co.*, 4 O.L.R. 560.

Ice and snow sidewalk cases call strictly for notice; but it may be dispensed with where reasonable excuse and absence of prejudice are both established: *Drennan* v. *City of Kingston*, 27 Can. S.C.R. 46.

The legislation and decisions as to the requirement of notice would appear to be more elastic under Workmen's Compensation Laws in the different provinces than under the municipal laws. It will be noted in this connection that the trial Court may adjourn or postpone the trial to enable notice, or amended notice, to be given, under certain of the statutes.

Ignorance of the law is not sufficient excuse, whether or not it may be an element in arriving at a conclusion as to whether the circumstances of the case shew reasonable excuse: *Biggart* v. *Town of Clinton*, 2 O.W.R. 1092.

The degree of physical and mental disability necessary to constitute reasonable excuse is specially considered in *Drennan* v. *City of Kingston*, 27 Can. S.C.R. 46, and *O'Connor* v. *Hamilton* (1905), 10 O.L.R. 529.

For convenience the following summary may be found useful:—

1. The statutory-negligence action requiring notice of accident is in Ontario a modern innovation dating back only to 1892.

2. The notice may be excused for other good causes where the want of notice has not prejudiced the defendant.

3. The other good causes which will suffice to excuse the notice have never been defined, but the Courts are left to reach their own conclusions in the circumstances of each particular case.

4. Proof that the want of notice has not prejudiced the defendant is not of itself sufficient to excuse notice, although it may be an element in considering reasonable excuse.

5. Ignorance of the law is not sufficient excuse, although it also may be an element in considering reasonable excuse.

6. Notice is not excuse by (*a*) verbal notice, (*b*) physical and mental inability to give it for part of the statutory period, and (*c*) ignorance of the law requiring it: *Egan* v. *Township of Saltfleet*, 13 D.L.R. 884, *supra*.

7. Notice is excused by (*a*) notoriety of the accident, (*b*) defendant's knowledge of the accident, (*c*) defendant's knowledge of a claim based thereon, and (*d*) defendant's taking the claim into consideration and holding it in abeyance and thereby lulling and misleading the plaintiff: *Armstrong* v. *Canada Atlantic R. Co.* (1902), 4 O.L.R. 560.

IN THE COUNTY COURT OF THE COUNTY OF PERTH.

BANK OF HAMILTON AND A. MCEACHERN *v.* GRAND TRUNK RY. CO.

Sale of goods—Carrier—Bill of lading—Forged endorsement—Railway company—Responsibility of, for genuineness of signature.

The plaintiff McEachern, a farmer, sold to one W. a carload of hay. A sight draft was drawn through the Bank of Hamilton on W. then of Toronto for the price. To the draft was attached a bill of lading on the "Form of Order Bill of Lading approved by the Board of Railway Commissioners for Canada by order No. 7562, of 15th July, 1909." The draft and bill of lading (both to the order of the Bank of Ottawa) were by McEachern's authority sent to a branch of the Bank of Ottawa in Toronto with instructions to collect the draft before endorsing and handing the bill of lading to W. W. refused both the hay and the draft whereupon the Bank of Ottawa was instructed to surrender the bill of lading to D. and return the draft—D. being unknown to the manager of the Bank of Ottawa, the latter endorsed the bill of lading: "Deliver to the order of D., on payment of all charges, without recourse for the Bank of Ottawa," signed the endorsement and enclosed the bill in a sealed envelope addressed to D. which he intrusted to W. to deliver to D. W., unknown to D., obtained a delivery of the hay to an Ice Company.

The bill of lading had on its face, printed in prominent characters, "The surrender of the Original ORDER Bill of Lading pro-

perly endorsed shall be required before delivery of the goods." Defendants produced the way-bill of the hay and a receipt of the Ice Company for same. They could not produce the bill of lading nor account for its disappearance. Their "carload clerk" testified that an advice note was sent to W., as consignee; that W. brought in the bill of lading already endorsed and surrendered it to him and the charges were paid; that W. endorsed a direction to deliver to the Ice Company, but that the bill of lading purported to be endorsed by D. It was not customary, he said, to require the signature of the endorser to be verified.

The following cases were cited or referred to by the judge: *Henderson* v. *The Comptoir D'Escompte de Paris,* L.R. 5 P.C. App. 253; *R.C. Bank* v. *Carruthers,* 28 U.C.R. 278, and 29 U.C. R. 283; *Heugh* v. *London and N.W. Ry. Co.,* 5 L.R. Ex. 50; *McKean* v. *McIvor,* L.R. 6 Ex. 35; *Couley* v. *C.P. Ry. Co.,* 32 O.R. 258. After differentiating these cases and mentioning the old case of *Lubbock* v *Inglis* (2 Starkie 104), E.C.L.R. vol. 2, p. 48.

ERMATINGER, acting Co.J.: "The case before me is that of a carrier, who is in some respects more strictly accountable in law than a wharfinger or warehouseman. I see no difference in principle, however, between the case just cited (*Lubbock* v. *Inglis*) and this case. Moreover in the present case, the special contract entered into by the defendants (according to form approved by the Railway Commission) must not be lost sight of. The action is founded upon it and defendants in their statement of defence specially refer to it. It is termed an "order bill of lading" to distinguish it from an ordinary bill of lading for direct consignments I suppose. The clause already quoted provides not only for surrender of "this original order bill of lading," but "*properly endorsed*" also. Can it be said to be properly endorsed when the endorsement is forged?

It is a matter of surprise to me that no case of a forged order bill of lading has been cited, and it is said that none is reported. Possibly the point involved is considered so plain as to be beyond argument, namely, whether a railway company must be held responsible for the genuineness of the signatures of endorsement in all cases where the plaintiff is not estopped from questioning it. Is it sufficient for them to say, "We took ordinary and reasonable precautions and have been the victims of a fraud?" The banks have to face the same responsibility every day, and why not the railways, when their contract so explicitly requires it?

I have already referred to the indiscretion of the bank manager in conveying the bill to D. by the hand of W. in a sealed envelope as insufficient to exonerate defendants. I have similarly resolved my doubts raised by the unexplained absence of the bill of lading from the company's possession, in defendant's favour, and have placed my decision on the broad ground of the responsibility of the railway to see that the order bills of lading are "properly endorsed," according to their explicit terms. The importance of the question to both railway company and shipper must be my excuse for discussing the case at such length as I have.

I have not considered the Ice Company's responsibility in the matter as they are not parties and no one has asked that they be added as parties. I do not think the plaintiff bound to look to the Ice Company, if the railway is responsible, as I hold it to be. There will be judgment for plaintiff Archibald McEachern for $121 against defendants. As to costs, I follow the precedents afforded in *Moshier* v. *Keenan*, 31 O.R. 658, and other cases, in withholding costs against defendants. The delivery of the bill of lading by the Bank of Ottawa to W., though under cover, facilitated the wrongful delivery of the goods by defendants. The Bank of Ottawa was specially named to the Bank of Hamilton by plaintiff McEachern or his son as agents in the matter."

Coughlin, for plaintiffs. *Foster*, for defendants.

Province of Nova Scotia.

SUPREME COURT.

Sir Charles Townstend, C.J., Meagher, Longley, Ritchie, JJ.] [13 D.L.R. 844.

MILLER *v.* HALIFAX POWER CO., LTD.

THOMPSON *v.* HALIFAX POWER CO. LTD.

Courts—Jurisdiction—Relation to other departments of government—Eminent domain—Power to determine necessity for —Injunction—Governor-in-Council.

1. The question whether a necessity exists for the expropriation of land by a company is not one to be decided by a court in the first instance, but for the Governor-in-Council, where the

charter of the company, secs. 17 and 19 of ch. 113 of N.S. Acts. 1911, provide that whenever it is necessary that the company should be vested with land, lakes or streams or land covered with water for the purposes of its business and no agreement can be made for the purchase thereof, the Governor-in-Council may order its expropriation if satisfied that the property is actually required for the business of the company, and that it is not more than is reasonably necessary therefor, and that the expropriation is otherwise just and reasonable. (*Per* Townshend, Ritchie, and Longley, JJ.)

2. The court will not enjoin a proposed application by a company to the Governor-in-Council for permission to expropriate land or an easement for the purposes of its business, as permitted by its charter, ch. 113 of N.S. Acts, 1911, on the ground that the property sought was not such as could be acquired by expropriation, because affected with public rights, or rights already acquired by others under statutory grants; since the court cannot assume in advance that the Governor-in-Council will exceed his jurisdiction or act illegally and grant permission to take land not subject to expropriation. (*Per* Townshend, C.J., and Longley, J.)

3. Statutory powers of expropriation in the incorporating statute of a power company are to be strictly construed so as not, by mere general words authorizing expropriation for the damming of a river, to deprive the public of rights theretofore existing unless a clear legislative intention to abrogate public rights is disclosed in the statute. (*Per* Ritchie, J.)

T. S. Rogers, K.C., for appellants. *H. Mellish,* K.C., and *F. H. Bell,* K.C., for respondents

Province of British Columbia

COURT OF APPEAL.

Macdonald, C.J.A., Irving, Martin, and Galliher, JJ.A.] [13 D.L.R. 822.

McKISSOCK *v.* McKISSOCK.

Husband and wife—Property rights—Transactions between—Purchase of land by wife with money furnished by husband for investment for joint benefit.

A married woman who purchases land in her own name with

money furnished her from time to time by her husband from his wages and other sources, will be required to convey a half interest therein to her husband, where the money was given her for the express purpose of being invested in land for their joint benefit, share and share alike.

J. H. Senkler, K.C., for plaintiff, respondent. *R. M. Macdonald,* for defendant, appellant.

ANNOTATION ON THE ABOVE CASE.

1. *Wife having custody or control of husband's money.*

Under sec. 10 of the Imperial Married Woman's Property Act of 1882 (45 & 46 Vict. ch. 75), where any investment is made by a wife in her own name with money belonging to her husband without his consent, any Judge of the High or County Court may order the investment and dividends, or any part thereof, transferred or paid to the husband: 16 Halsbury's Laws 404. And any savings of a married woman made while living with her husband, from the proceeds of his business, or from an allowance by him for housekeeping expenses, dress or the like, belongs to the husband, although invested in the name of the wife, unless it appears that he intended that such savings should belong to the wife as a gift from him: 16 Halsbury's Laws 358; *Bruneau* v. *Lefairre*, 34 Que. S.C. 173; *Barrack* v. *McCulloch*, 3 Kay & J. 110. So savings made by a wife, from money remitted unconditionally to her by her absent husband, above the maintenance of the family, and deposited by her in bank in her own name, belong to her husband on a separation between them taking place: *Birkett* v. *Birkett*, 98 L.T. 540. And where a married woman sold chattels belonging to her husband, who was of unsound mind, although not so found, and applied the proceeds to her own use, on the death of her husband his representative is entitled to recover the proceeds of such sale from the wife's executor: *Re Williams, Williams* v. *Stratton*, 50 L.J.Ch. 495. The general rule in the United States, as shewn in the annotation to the case of *Ford Lumber & Mfg. Co.* v. *Curd*, 43 Lawyers' Reports Annotated 685, is that money saved by the wife in managing the home of husband and wife belongs to the husband; and that, in general, property purchased by the wife therewith, belong to the husband, and may be reached by his creditors.

But a married woman will be entitled to savings made by her from a household allowance, etc., if it appears that her husband intended that she should take it as a gift: 16 Halsbury's Laws 358. Thus, where a married man permits his wife to have for her separate use the profits from butter, eggs, etc., beyond what was used in the family, and the husband borrows a portion of the wife's savings, she may prove the claim against his estate, especially where there is no deficiency of assets: *Slanning* v. *Style*, 3 P.W. 337. And where a married woman is permitted by her husband to retain two guineas from every tenant who renewed a lease with

her husband, savings therefrom belong to the wife: *Slanning* v. *Style*, 3 P.W. 337. And savings from money a woman swears her husband gave her in his lifetime, belong to her: *McEdwards* v. *Ross*, 6 Gr. 373.

Money saved by a married woman from an allowance paid for her separate support by her husband, from whom she was living apart, belongs to her and cannot be recovered by him: *Brooke* v. *Brooke*, 25 Beav. 342. And a wife's savings from an annual allowance for her separate maintenance paid under an order in lunacy, will be her separate property, although the order did not expressly so provide: *Re goods of Tharp*, 3 P.D. 76, 38 L.T. 867. So a wife living separate from her husband may make a gift of her savings from an allowance for her separate maintenance, as if she were a *feme sole*: *Gage* v. *Lister*, 2 Bro. P.C. 4; or she may dispose of it by will: *Bletson* v. *Pridgeon*, 1 Ch. Cas. 118; *Humphrey* v. *Richards*, 25 L.J. Ch. 442.

Where a married man receives a legacy belonging to his wife, but not for her separate use, and to which, therefore, he is entitled, and gives it to her to care for, and she, without his consent, deposits it in bank in the name of her infant son by a former marriage, the husband may recover the deposit from the banker: *Calland* v. *Lloyd*, 6 M. & W. 26. So money of a married man which he deposits in a bank account of his wife as executrix will pass, on his death, to his representative: *Lloyd* v. *Pughe*, L.R. 14 Eq. 241. And where a man borrows from trustees money held for the benefit of his wife, without ever paying any interest on the debt, it will be presumed, in order to prevent the debt becoming barred by the Statute of Limitations, that the latter gave the arrears of interest to her husband: *Re Dixon*, *Heynes* v. *Dixon*, [1900] 2 Ch. 561. And where a married woman, during her husband's absence, carries on his business, and deposits the profits in a bank in her own name, according to an arrangement between them, in order to protect it from his creditors, the money is not attachable by garnishment by the latter as a debt due her husband: *St. Charles* v. *Andrea*, 41 N.S.R. 190. Where a woman with money received from her husband purchased a homestead in her own name, and subsequently sold it to a third person, who, before the completion of the agreement for sale, became aware that she was not a widow, the husband is entitled to a declaration that the wife held the property as trustee, and to recover from the purchaser the money which, after notice of the husband's claim, the latter had paid to secure an immediate conveyance: *Dudgeon* v. *Dudgeon*, 13 B.C.R. 179.

2. *Husband having custody or control of wife's money.*

No presumption of a gift from a married woman to her husband arises from a purchase of property with or an investment of her money by her husband in his own name or their joint names; and under such circumstances the husband is to be presumed a trustee for the benefit of his wife, in the absence of evidence of a contrary intention: 16 Halsbury's Laws 396. This rule will be applied where a married man receives and retains

the proceeds of a sale of his wife's separate property without ever accounting for it: *Briggs* v. *Willson*, 24 A.R. (Ont.) 521. And a resulting trust arises in favour of a married woman from the purchase by her husband in his own name of a house with her money, which had been deposited in bank in their joint names: *Mercier* v. *Mercier*, [1903] 2 Ch. 98 (C.A.).

Where a married man induces his wife to sell shares held in their joint names, on his promise to reinvest the proceeds in the same manner, but which he used without the knowledge of his wife, in part payment for land purchased in his own name, on his death his widow is entitled to a lien on the land for the proceeds of such sale: *Scales* v. *Baker*, 28 Beav. 91.

Where money bequeathed to a married woman's separate use, was lent during coverture on a mortgage payable to the husband and wife or the survivor of them, which was prepared by her husband's solicitor, and which untruly recited that the money lent belonged to the wife before marriage and was not comprised in any settlement, the wife executing the conveyance without it being read to her, or having independent advice, she may, on being deserted by her husband, have the deed declared void, and the mortgagor required to execute a new mortgage in favour of her alone: *Knight* v. *Knight*, 5 Giff. 26.

Under R.S.M. 1891, ch. 95, sec. 5, relative to the separate property of married women, there is no presumption from the receipt by a man of the corpus of his wife's separate estate that it was a gift; and she may recover it without evidence either of a bargain or agreement for a loan: *Thompson* v. *Didion*, 10 Man. LR. 246. And a man who receives money belonging to his wife will be a trustee for her in respect thereto unless he can shew clearly and conclusively that there was a gift of it to him: *Ellis* v. *Ellis*, (Ont.) 12 D.L.R. 219.

A woman, whose claim that her husband permitted her to carry on a farming business on a farm owned by him, and to treat the proceeds as her separate property, is uncorroborated, is not entitled to the proceeds of the business which her husband invested in his own name: *Whittaker* v. *Whittaker*, [1882] 21 Ch.D. 657.

Where the trustee of a fund, the income from which was payable to a married woman for life, permits her husband to use a portion of the fund for a number of years, the wife, on separating from her husband, cannot recover interest on such sum, where she admitted that she allowed her husband to receive her income as long as he behaved as a husband should, and she did not claim interest until after his desertion: *Rowley* v. *Unwin*, 2 Kay & J. 138.

A wife's assent to the mere receipt by her husband of a legacy bequeathed to her separate use will not raise a presumption of a gift to him: *Alexander* v. *Barnhill* (1888), 21 L.J. Ir. 511; *Rowe* v. *Rowe*, 2 DeG. & Sm. 294. And a bequest to a wife by husband of a large sum will not be considered as a satisfaction of her claim against his estate in respect to the legacy so received by him: *Rowe* v. *Rowe*, 2 DeG. & Sm. 294. So the delivery by a woman to her husband of a cheque for a legacy

belonging to her and its deposit in bank in his own name a few days before his death, cannot be regarded as a gift of the money to him: *Green* v. *Carlett*, 46 L.J.Ch. 477, 4 Ch.D. 882.

But a woman who permits a legacy bequeathed to her to come into her husband's hands and to be employed by him in his business and in paying family expenses, will be regarded as having assented to such use of the money, so as to prevent her from recovering the amount of the legacy from his estate: *Gardiner* v. *Gardiner*, 1 Giff. 126.

Where, after the passage of the Imperial Married Woman's Property Act of 1870, a wife became entitled in possession to a sum of money to which, before marriage, she was entitled to in expectancy, and joined with her husband in petitioning the Court of Chancery to pay it to him in his own right, he became vested with the money by virtue of such petition: *Lane* v. *Oakes*, 30 L.J. 726. And where a married woman, who was entitled to a separate property, joined with her husband in appointing an agent to receive the rents, and the latter deposited them in a bank, from which the husband drew them and appropriated the money for purposes of his own, the balance on deposit at his death will belong to his estate, by reason of his wife's acquiescence in his conduct: *Bersford* v. *Armaugh*, 13 Sim. 643. And a gift will be presumed where a married woman, under a power, permitted shares of stock to be transferred to herself and husband, and then consented to the latter selling them, and he appropriated the proceeds of the sale to his own use: *Hale* v. *Sheldrake*, 60 L.T. 292. So the written assent of a woman to the payment by trustees to her husband of a fund from which he was entitled to the interest for life, with remainder to her, will relieve the trustees from liability to the wife for making such payment: *Cresswell* v. *Dewell*, 4 Giff. 460.

Where stock, to which a woman was entitled to the separate use, was improperly transferred by a trustee into the joint names of himself and her husband, and the latter received the dividends until the death of the trustee, when the stock was sold by the husband, and, without the knowledge of his wife, the proceeds were applied by him to his own use, on his subsequent desertion of his wife she is entitled to recover from her husband and the estate of the deceased trustees the arrears of dividends accruing since the sale; and to have the trust fund replaced; notwithstanding it might be presumed that she assented to her husband's actual receipt of the dividends while the stock was intact yet no such assent could be presumed after its sale: *Dixon* v. *Dixon*, 48 L.J.Ch. 592, 9 Ch.D. 587. And where a married man, who was a trustee for his wife, applied the capital belonging to her estate to his own use, and, although she wished to give him the money, he refused to accept it, and always spoke of it as belonging to her, he is to be regarded as a trustee for his wife, and after his death she may prove a claim against this estate for the capital together with interest thereon from his death: *Re Blake, Blake* v. *Pou*[illegible]30 L.T.N.S. 663.

A married man who receives his wife's separate income and applies it for their common benefit, is not answerable to the wife therefor: *Ellis* v. *Ellis* (Ont.), 12 D.L.R. 219; *Payne* v. *Little*, 26 Beav. 1; *Squire* v. *Dean*, 4 Bro. C.C. 326; *Bartlett* v. *Gillard*, 3 Russ. 149. And a married man will not be required to account to his wife for arrears of her separate income paid to him without a demand therefor having been made by the wife: *Leach* v. *Way*, 5 L.J. Ch. 100; *Smith* v. *Camelford*, 2 Ves. Jr. 698; *Squire* v. *Dean*, 4 Bro. C.C. 326. So a married woman who permits her husband to receive her separate income or pin-money cannot require him to account for it, if at all, back of the year: *Parker* v. *White*, 11 Ves. 205; *Townshend* v. *Windham*, 2 Ves. 1; *Thompson* v. *Harman*, 3 Myl. & K. 513. Where a married man is permitted by his wife to receive the income from a sum settled on her for her separate use, a gift of such income to the husband will be inferred: *Edward* v. *Cheyne*, 13 App. C.H.L. 385; *Young* v. *Young*, 29 T.L.R. 391. But where paid the husband for the purpose of investment for the wife it will remain her property: *Young* v. *Young*, *supra*.

In *Ellis* v. *Ellis*, (Ont.) 12 D.L.R. 219, it was said that a woman who seeks to recover income paid to her husband and expended for their joint benefit, must shew clearly and conclusively that he received it by way of loan.

A gift of the dividends from stock owned by a married woman will be inferred where, for a number of years, she permitted her husband to deposit them in bank in his own name, and to use the proceeds for purposes of his own: *Caton* v. *Rideout*, 1 Macn. & G. 599.

A married woman may recover from her deceased husband's estate, but without interest, money belonging to her which the former appropriated for her own use during his lifetime: *Re Flamauk*, *Wood* v. *Cock*, 40 Ch.D. 461. And money earned by a woman during the time she was deserted by her husband, and which he afterwards forcibly took from her, may be recovered by her: *Cecil* v. *Juxon*, 1 Atk. 278. So money belonging to a woman's separate estate, which her husband took forcibly from her, the return of which she frequently demanded, may, on her husband's death, be recovered by her from his executors; since her husband is to be regarded as a trustee for his wife; and, as the money was retained without accounting for it, his executor cannot, under the Trustee Act, 1888, sec. 8, claim the benefit of the Statute of Limitations: *Wassell* v. *Leggitt*, [1896] 1 Ch. 554.

Under the Imperial Married Women's Property Act (45 & 46 Vict. ch. 75), sec. 3, any money intrusted by a wife to her husband for the purpose of any trade or business carried on by him constitutes a part of his assets in bankruptcy; the wife being entitled, however, to rank as a creditor in respect thereto against his estate after the payment of creditors for a valuable consideration: 2 Halsbury's Laws 159, 16 *ib.* 434.

SUPREME COURT.

Murphy, J.] [14 D.L.R. 42.

WANDERERS' HOCKEY CLUB *v.* JOHNSON.

1. *Foreign judgment—Of sister province—Jurisdictional matters —Want of service on defendant—Effect.*

A judgment rendered in the Province of Quebec without personal service of process on the defendant who was out of that province while the proceedings were going on, is not binding on the courts of British Columbia in an action based on the Quebec judgment.

2. *Contracts—Validity and effect—Contract of employment by one under existing contract — Knowledge of contractee — Action for breach.*

Under the axiom ex turpi causâ non oritur actio an action cannot be maintained for the breach of a contract of employment where the plaintiff, at the time the agreement was made, was aware that it could not be performed without the defendant breaking an existing contract of employment with a third person. *Harrington* v. *Victoria Graving Dock,* 47 L.J.Q.B. 594, followed; and see, as to injunctions generally in restraint of personal service, *Chapman* v. *Westerby,* W.N. (1913), 277.

Deacon, for plaintiff. *S. S. Taylor,* K.C., for defendant.

Bench and Bar

THE LATE MASTER IN CHAMBERS, OSGOODE HALL, ONT.

On November 12th, Mr. James Strachan Cartwright, K.C., who, since April, 1903, has held the office of Master in Chambers, died at his residence in Toronto, after some months' illness.

Mr. Cartwright was the son of John Soloman Cartwright, Q.C., a former member of the Canadian Parliament, and was born in 1840 in Kingston where his father resided for many years. He received his education at the celebrated Public School of Rugby. He was a well educated man and came to the study of the law with a mind well equipped. In 1868 he was called

to the Bar and commenced practice in Napanee. In May, 1883, he received the appointment of Registrar of the former Queen's Bench Division of the High Court. In 1902, he was appointed K.C., and in the following year, on the appointment of his predecessor to the County Court Bench, he was made Master in Chambers, an office which he filled in a way entirely acceptable to the profession.

Mr. Cartwright was of a modest and retiring nature but was always genial and approachable. He had a sound mastery of legal principles and dealt with the matters that came before him in a way that was marked by good sense. That he will be remembered affectionately and respectfully by all who were thrown in contact with him in business, or socially, is beyond doubt. Beneath a somewhat grave and solemn exterior he cherished a keen sense of humour. Of him it may truly be said that he made the words of the prophet of old the rule of his life, and that doing justly, loving mercy, and walking humbly before his God, was his constant delight.

Appointments to Office.

William James Leahy, of the City of Regina, Province of Saskatchewan, Barrister-at-law, to be Judge of the District Court of the District of Kerrobert. (Nov. 8.)

Algernon Edwain Doak, of the City of Prince Albert, Province of Saskatchewan, Barrister-at-law, to be Judge of the District Court of the Judicial District of Prince Albert. (Nov. 8.)

Flotsam and Jetsam.

A Merciless Verbatim Reporter.

Very few speakers are precise and accurate enough to stand well in an absolutely verbatim report. There are speakers who scarcely ever complete a sentence grammatically. There are others who use unwittingly the most hopeless words and phrases, and there are a few who are fond of involved sentences for which they can never find a subject, a predicate, and a close. I have come across a verbatim report of a wonderful question addressed by Lord Chief Justice Hyde to an accused person. If any reader can make head or tail of it I should like to hear

from him. Here is the question: "You took a man in the dark by the throat, that man that was guilty of such a thing, as when that you did let him go to call his companions to bring the money, bring fellows to you single; I would be glad to know whether in this case they would not have knocked you on the head and killed you?"

Here is another amazing utterance by the great Lord Eldon himself at the trial of a certain O'Coigly for high treason: "Therefore any means which can be adopted consistently with the rules of justice, to know who these three persons are, I shall certainly think it my duty, again protesting against its being considered as any censure upon them, so far to concur with my learned friends in what they have been stating, as to relieve the prisoner from the necessity of challenging those persons by challenging them myself." I do see a glimmer of light in the second utterance, but none in the first.—*Ex.*

A carrier is held in *Lilly* v. *St. Louis & S. F. R. Co.* (Okla.) 39 L.R.A. (N.S.) 663, to be liable to a passenger who holds a through ticket over its road but who must make a change of trains to reach her destination, for the failure and refusal of its employees to inform such passenger, upon her repeated requests for information, of the place where such change is to be made, by reason of which failure the passenger is carried past her destination, and is required to take passage upon another railroad and to expend an additional sum for fare, and is caused to suffer a loss of time and certain inconveniences.

THE LIVING AGE. Boston, Mass., U.S.A.—The leading article of this interesting serial for November 1, on "Blundering Social Reform," reprinted from *The Nineteenth Century and After* has a lesson for American as well as British philanthropists, who are too apt to be carried away by various social fads without giving enough consideration to their practical aspects.

Sir Bampfylde Fuller is the author of "A Psychological View of the Irish Question," reprinted in *The Living Age* for November 8 from *The Nineteenth Century and After*, which views the Irish question from a new standpoint and more sympathetically than usual.

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STATEMENTS OF DEFENCE.

A question which is agitating the minds of some practitioners, is whether, under the new Rules, an affidavit filed by the defendant with his appearance to a specially indorsed writ must, in default of his filing a formal statement of defence, be regarded as "a statement of defence." We should have thought that there could be hardly any question that it must, but it is said that some great authorities have expressed a different opinion. In the old days of equity pleading, the older practitioners will remember the statement of defence, or, as it was then called, "the answer" of a defendant, was, as a rule, required to be sworn; and was really in substance an affidavit. Our present system of pleading is based on the old Chancery system, the statement of claim is the old bill in Chancery under a new name, the statement of defence is the old "answer" under a new name, but with a difference that it is not as a rule required to be verified by oath. The new Rules, however, have in the case of specially indorsed writs, practically restored the old Chancery practice and required the defence of a defendant to be verified by oath. This it is true is done by what is called an "affidavit," but what is in substance and in fact, to all intents and purposes, is the old Chancery "answer."

By Rule 56 (2) the plaintiff is expressly authorised to treat this affidavit as constituting the defendant's pleading—just as he is authorised to treat the indorsement on the writ as "the statement of claim," Rules 56 (2), 111, but if he does not elect to proceed to trial as provided by Rule 56, the defendant "may deliver a defence or counterclaim." Now what is troubling some officers and practitioners is this. Suppose he does not avail himself of this right, can he be treated as in default of a defence?

As we have intimated we should say clearly not, his affidavit is on the files shewing his defence, and, moreover, he has sworn to its truth. The technical practitioner may say, "Oh! but an affidavit is not a defence," to which we would reply, "Neither is an appearance a statement of defence," but, nevertheless, when a defendant embodied in his appearance a notice that he disputed the plaintiff's claim, the Divisional Court held that such statement could not be treated as nugatory and a judgment signed in default of defence was set aside as irregular: *Voight* v. *Orth*, 5 O.L.R. 443.

It would seem to be *á fortiori* where a defendant has placed on the files of the court an affidavit setting forth his defence and swearing to its truth, that it could not be disregarded, and on the contrary, it would be the merest technicality and without any shadow of justice to say that a plaintiff might, in such circumstances, sign judgment because the defendant did not think fit to put in an unsworn statement to the same effect as that disclosed by his affidavit.

It is we are informed a well authenticated fact that the learned Chancellor just before his elevation to the Bench was called on to advise how the following answer to a bill for foreclosure was to be regarded.

"In Chancery,
Between Henry Hart, Plaintiff,
and
John Brooke, Defendant.

Please enter in the Master's Book,
That I the said defendant Brooke
Dispute the claim of Henry Hart,
As to the whole and every part.
Acacia Cottage still is mine,
As surely as the sun doth shine,
No cruel Chancery suit shall blot,
The sacred memories of that spot.

JOHN BROOKE,
Defendant, Poet."

This document was not sworn and therefore was not a good "answer"; but according to the practice, a defendant might file a dispute note without oath, and we are informed that the opinion given was that the poetical effusion was a valid dispute note and should be so treated, which seems to be common sense.

Since the foregoing was written, Mr. Justice Kelly, in the case of *Smith* v. *Walker*, on appeal from Mr. Holmested, acting as Master in Chambers, has decided that if a defendant does not file a statement of defence under Rule 112, the plaintiff may not treat his affidavit as a defence, but must disregard it altogether. The facts of the case before Mr. Justice Kelly were as follows: To a specially indorsed writ a defendant appeared and filed an affidavit of defence. The plaintiff did not elect to proceed under Rule 56 (2), but at the expiration of ten days from appearance, no statement of defence having been filed, he filed a joinder of issue and gave notice of trial. The defendant moved to set aside the joinder of issue as irregular. The acting Master in Chambers refused the application, holding that the plaintiff was regular, and that the affidavit was properly treated as the defence, following *Voight* v. *Orth, supra,* but Mr. Justice Kelly set aside the joinder of issue as being irregular and allowed the defendant to file a statement of defence. This decision therefore virtually determines that an affidavit disclosing a defence filed under Rule 56 is a defence only for the purposes of that particular Rule; but if the plaintiff does not elect to proceed under that Rule it is not a defence, and at the lapse of ten days from appearance, if no statement of defence is filed, the plaintiff may sign judgment for default of defence.

In short the whole procedure suggests a sort of thimble rigging performance as regards the defendant's affidavit of defence. "Now you see it and now you don't see it."

COURTS OF FINAL APPEAL.

The findings of the judges of the Supreme Court in the cases submitted to them in reference to the incorporation of companies and as to the construction of the Insurance Act (see post pp. 749) are a somewhat remarkable illustration of the adage "Quot homines tot sententiæ."

It is common knowledge that in our Supreme Court, as at present constituted, there is a great lack of unanimity; and this is said to come more from one seat than from the others, doubtless indicating a virile independence of thought, and which may also possibly be an illustration of some one's saying that the minority is generally in the right. On the occasions before us, however, to use some nautical phrases which seem appropriate, it was not a spectacle of the result of the exhortation well known to rowing men, of "pull together," but rather of each of them "paddling his own canoe." The result in these cases is that it is not at all clear what the law is on any of the points involved.

We are quite aware that the opinions we have referred to were the result of references to the judges of the Supreme Court under s. 60 of the Supreme Court Act, a provision which came before the Privy Council in *Attorney-General of Ontario* v. *Attorney-General of Canada* (1912), A.C. 571 (see ante vol. 48, pp. 504-507) so that each judge was justified in expressing his individual opinion, and probably was so required. At the same time we wish to take this opportunity of again calling attention to the most important and desirable proposition that the judgments of our court of final appeal should express the views of the majority of the judges, if there are differing views, and that all dissenting opinions should remain a secret of the judge's private council chamber.

The subject of uniformity of decisions on such branches of law as are applicable to all the States of the Union is engaging the attention of judges and legal writers in the United States.

Greater uniformity in the laws of this Dominion was the wish of the fathers of Confederation, and some progress has been made in that direction. It should receive greater attention than it does from our legislators. We have perhaps done more than has been done by our neighbours, but much remains to be done. The subject is much discussed in recent legal journals, especially with reference to negotiable instruments. We have accomplished something in that direction, but there are other branches of the law which need similar attention here; and nothing would tend more to unification of the Dominion than uniformity in legislation.

POST-DATED CHEQUES.

The law relating to post-dated cheques is by no means well settled. In a recent case before Mr. Justice Scrutton (*Hutley* v. *Peacock*, Oct. 25) the defence of infancy was set up in an action by the holder of a post-dated cheque against the drawer. This defence was successful, and the case is referred to only because a mere passing mention of *Forster* v. *Mackreth* (16 L.T. Rep. 23; L. Rep. 2 Ex. 163) seems to have been considered a sufficient statement of the law relating to post-dated cheques. Now *Forster* v. *Mackreth* merely decided that the post-dated cheque there sued on could not in substance be distinguished from a bill of exchange at seven days' date, and it was accordingly treated as a bill of exchange and not as a cheque. *Forster* v. *Mackreth* is not an authority for the general proposition that a post-dated cheque is a bill of exchange properly so-called and not a cheque.

A post-dated cheque is, in fact, an instrument sui generis, being in some respects a bill of exchange payable at a future time and in other respects a cheque payable on demand. The principal sections of the Bills of Exchange Act, 1882, that are relevant are ss. 3, 13, and 73. S. 3 defines bills of exchange generally as unconditional orders to pay "on demand or at a fixed or determinable future time." S. 13 has reference to the date on bills; it enacts that the expressed date is to be deemed

the true date "unless the contrary be proved," and also enacts that "a bill is not invalid by reason only that it is . . . post-dated." S. 73 defines cheques as bills of exchange "drawn on a banker payable on demand."

That a post-dated cheque is a valid and negotiable instrument has been settled by many decisions of the courts, and it will be sufficient to cite what is believed to be the latest to that effect—*Royal Bank of Scotland* v. *Tottenham*, a decision of the Court of Appeal (71 L.T. Rep. 168; (1894) 2 Q.B. 715). In that case the plaintiffs on the 8th Aug. received and placed to the account of a customer a cheque dated the 10th Aug. drawn by the defendant. The cheque being dishonoured on presentation, through the defendant having stopped payment of it, the plaintiffs were held to be entitled to sue the defendant, as being holders for value.

With respect to stamp duty, a post-dated cheque is on the footing of an ordinary cheque and not a bill of exchange. Being payable "on demand," the post-dated cheque comes under the heading of the schedule to the Stamp Act, 1891, "Bill of exchange —payable on demand or at sight or on presentation—1d." The fact of the date constituting a direction not to present or pay at once does not prevent the instrument being payable "on demand." This was decided in *Royal Bank of Scotland* v. *Tottenham* (*sup.*). See also *Hitchcock* v. *Edwards* (60 L.T. Rep. 636, Mr. Justice Cave). In every reported case of an action against the drawer of a post-dated cheque the action has almost necessarily been heard some time after the date expressed on the cheque, and the cheque then necessarily appears on its face to be properly stamped, there being nothing to indicate that it was actually drawn and issued before the date appearing on it. Apparently, if an action could be conceived as being brought on a post-dated cheque long before the expressed date, the cheque would have to be stamped as an ordinary bill of exchange in order to be valid and admissible in evidence. However valueless for practical purposes this consideration may be, it certainly follows from the ratio decidendi in *Royal Bank of Scotland* v. *Tottenham* (*sup.*), and the decision in that case as to the 1d. stamp duty on post-dated cheques being sufficient is somewhat unsatisfactory from a theoretical and juridical point of view.

As regards some of the consequences of the drawee or banker paying the cheque before its expressed date, the post-dated cheque resembles a bill of exchange. It is laid down by Baron Parke in *Morley* v. *Culverwell* (7 M. & W., at p. 178) as follows: "If the acceptor pays the bill before it is due to a wrong party, he is not discharged. It has been so held in the case of a banker's cheque payable to bearer; if the banker pays it before it is due, he is not protected." The authority cited for the latter of these two propositions is *Da Silva* v. *Fuller*, an old unreported case of 1776, of which the note in Chitty on Bills (11th edit., 1878), p. 188, is: "Where, however, a cheque, which had been lost by the payee, was paid the day before it bore date, such payment was held to be invalid, and the banker was held liable to repay the amount to the loser." There appears to be no more modern case on this point than *Da Silva* v. *Fuller*.

In actions against the drawer by the holder, the post-dated cheque is precisely on the same footing as an ordinary cheque. *Royal Bank of Scotland* v. *Tottenham* (*sup.*) and *Hitchcock* v. *Edwards* (*sup.*) are examples of this. In both cases the holder gave value for the cheque before the expressed date of it, and succeeded in his action against the drawer after payment at the drawer's bank had been stopped. *Carpenter* v. *Street* (6 Times L. Rep. 410) was another case of the same kind before the Divisional Court (Lord Coleridge, C.J. and Mr. Justice Wills). The defendant stopped payment of the cheque, and the principal defence was that the plaintiff had taken the cheque before its expressed date and when it was not "regular on the face of it": (s. 29). It was held, however, that the cheque was "regular on the face of it," notwithstanding the date it bore had not yet arrived when the plaintiff took it, and the plaintiff succeeded.

With regard to one consequence of a post-dated cheque being paid by the banker on whom it is drawn before the date, neither bills of exchange nor ordinary cheques afford a clear analogy, and the post-dated cheque in this respect stands by itself. It may happen that the drawer's account at the bank is not sufficient to meet the payment of further cheques in the event of the post-dated cheque being presented and paid before the date upon it.

If then, in consequence of a too early payment of the post-dated cheque, another cheque, subsequently drawn (not post-dated) and immediately presented, is dishonoured, has the drawer and customer any remedy against the bank? There appears to be no reported case in England of any action having been brought against a bank under such circumstances. In the text-books on banking, the case of *Da Silva* v. *Fuller* (*sup.*) is cited for the proposition that a banker is not justified in paying a post-dated cheque before its expressed date, but this case is not an authority as between banker and customer, and only relates to the risk the bankers run in possibly paying the wrong person. In the absence of authority, the question would have to be decided on principle should it arise in the English courts. Singularly enough, the question has arisen more than once in the Australasian courts, and contrary decisions have been arrived at. In Victoria and New Zealand a bank has been held liable in damages for dis honouring cheques in consequence of the customer's account being depleted by the premature payment of a post-dated cheque. In Queensland, under precisely similar circumstances, the bank was held not to be liable. The references to these cases are: *Hinchcliffe* v. *Ballarat Banking Company* (1870, 1 V.R.L. 229 (Victoria)); *Pollack* v. *Bank of New Zealand* (1901, 20 N.Z.R. 174 (New Zealand)); *Magill* v. *Bank of North Queensland* (1895, 6 Q.L.J. 262 (Queensland)).

The Bills of Exchange Acts then in force in Australasia were, for the present purpose, identical with the English Act of 1882. The Victorian case was decided before any codifying statute was in operation, the New Zealand and Queensland cases after codifying Acts had come into operation. The salient points in these cases were these: The Victorian and New Zealand courts relied on *Forster* v. *Mackreth* (*sup.*) and treated the post-dated cheque as a bill of exchange payable on the expressed date of the cheque, the New Zealand court holding that the codifying statute had made no difference in the law; the Queensland court held *Forster* v. *Mackreth* no longer applicable since the codifying statute, and also held that the true date of the post-dated cheque was the day of its issue and not the date expressed in it, with the result

that the post-dating was under the circumstances quite ineffective. There is a sharp contrast between the views of the New Zealand and Queensland courts respectively as to the effect of the bank paying the cheque in the face of what amounted to a direction not to pay until a certain future date. The New Zealand court held this to be fatal, and that the bank had done a wrongful act for which it must suffer the consequences. The Queensland court held that the bank had given value for a valid and negotiable instrument and were holders of the cheque and so entitled to set it off against the customer's balance in the bank's books.

To give effect to the view that prevailed in Queensland, it is necessary to presume that a banker can pay his customer's cheque in spite of notice not to pay it, and also that presentment of a post dated cheque before its expressed date is in itself evidence that the expressed date is not the true date. Neither of these positions seems correct. The balance of argument therefore seems to lie with the New Zealand view, and it is submitted that the English courts would under similar circumstances agree with the New Zealand rather than the Queensland decision. The New Zealand decision was that a bank was liable to its customer for dishonouring his cheques if the depletion of the account was caused by the bank's own act in prematurely paying a post-dated cheque drawn on the bank by the customer.—*The Law Times.*

THE VETO OF THE CROWN.

The controversy with reference to the veto of the Crown as an operative part of our Constitution in practice has elicited very intense antagonism of opinion on the part of leading constitutional authorities. On the 20th April, 1911, when the measure which is now the Parliament Act, 1911, was under discussion in its committee stage in the House of Commons, Mr. Asquith said: "I have pointed out over and over again in these debates, that the veto of the Crown was just as operative 200 years ago as the veto of the House of Lords to-day. We have got rid of the veto of the Crown without any breach of continuity in

the history of our Constitution. The veto of the Crown has gone. It is as dead as Queen Anne. It has gone by disuse, and so ought the veto of the House of Lords to have gone by disuse." Mr. Dicey, however, in a letter to the *Times*, relies on a dictum of Edmund Burke that the veto of the Crown is a reserved power still capable of being put into operation should occasion arise for its exercise. Professor Hearn maintains that although under the House of Hanover, the power of refusal has never been directly exercised, it must not on that account be supposed that the power is obsolete or inoperative. "On two occasions," he writes, "within the present [nineteenth] century, Acts of Parliament, although they had duly received the Royal Assent, have failed to come into operation from the refusal of the Crown to perform some act which was necessary to give them effect. One was an Act passed in 1794 (34 Geo. 3, c. 4) to enable the Government to carry into effect Mr. Bentham's celebrated project of the Panopticon. It appears that, whether from personal dislike to the author (as Bentham asserted) or for some reason now unknown, George III. disapproved of the plan. Various delays took place until at length all the arrangements were approaching completion, and nothing more remained except the purchase of one portion of ground. It appears that the King refused to sign the proper documents for the issue of the purchase money. Nothing further was done in the matter, but the Government was so much compromised that seventeen years after the first Act a second Act (52 Geo. III., c. 144) was passed by which a different system was adopted and compensation for the breach of contract to the amount of £23,000 was paid to Bentham. In 1850 an Act (13 & 14 Vict. c. 72) was passed under the auspices of Lord Romilly to improve the system of registration of assurances in Ireland. It contained a provision suspending its operation until certain indices were prepared and notice of its commencement consequently thereon was given by the Commissioners of the Treasury. No such notice, however, has yet (in 1867) been published. Probably, considering the advance made in public opinion since 1850 upon the sub-

ject of the registration of land, it never will be published." Queen Elizabeth in the Parliament of 1597 assented to forty-three Bills, public and private, and rejected forty-eight that had passed both Houses. James I., in assenting to all the Bills of the session, explained that he did so "as a special token of grace and favour, being a matter unusual to pass all Acts without any exception." Although the Stuarts preferred to use the dispensing power and lightly assented to Bills that they never intended to observe, yet the close of their system brought back the use of the old prerogative. On four important occasions, and once afterwards on a matter of less moment, William III. declined to sanction Bills. Once, and once only, after his death, when Queen Anne vetoed the Scottish Militia Bill under peculiar circumstances and in conformity to the wishes of both Houses, were the words *La Reine s'avisera* heard in Parliament. —*Law Times.*

POSSESSION AS A ROOT OF TITLE.

In these days when nearly every transaction connected with land is committed to writing there is a tendency to overlook the importance attached by the law to mere possession, but nevertheless possession still remains a root of title. In very early days, no doubt, possession was practically the only title to land; he was the owner who, with his retainers, was strong enough to take, and then to retain, possession. And in the more civilized of ancient communities land was transferred from one person to another by physical possession being given in the presence of witnesses. A record of what was done might be drawn up and signed, as in the case of livery of seisin, but the writing did not constitute the title to the land; it was merely evidence in support of the title.

If a person to-day enters upon and takes possession of a parcel of land, without any title or even colour of title thereto, but merely as a wrongdoer, what is his position in the eyes of the law? At first no doubt he is a mere trespasser, and could

be evicted by the true owner, or by any person, not being the true owner, who was in possession of the land. But this latter person may himself have originally been a mere trespasser. This raises the question, at what point of time does the original taking possession by a stranger to the title cease to be regarded as a mere trespass, and evolve into the "possession" that is so respected by the law? The answer appears to be, when he has remained for some time in peaceable possession of the land, exercising with respect to it the ordinary rights of an occupier.

In *Doe d. Hughes* v. *Dyeball* (1829), Moody and Malkin's Rep. 346, the plaintiff in ejectment proved a lease to himself and a year's possession, and rested his case there. The defendant, who had forcibly taken possession, objected that no title was proved in the demising parties to the lease. Lord Tenterten, C.J., said: "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must shew your title."

The failure on the part of the plaintiff to prove that his lessors title obviously made the lease worthless as evidence of the plaintiff's title, and the plaintiff succeeded on the other evidence adduced by him, viz., that he had had a year's possession. Thus the case shews that possession in the plaintiff and nothing more is sufficient to enable him to maintain ejectment against a stranger.

In *Asher* v. *Whitlock* (1863), L.R. 1 Q.B. 5, Cockburn, C.J., referring to the above mentioned case, said: "In *Doe* v. *Dyeball* one year's possession by the plaintiff was held good against a person who came and turned him out, and there are other authorities to the same effect," thus putting that case upon possession alone.

Perhaps the most emphatic way in which the law shews its respect for possession is by its rule that "the fact of possession is primâ facie evidence of seisin in fee." *Per* Mellor, J., in *Asher* v. *Whitlock*, 6; see also Newell on Ejectment (1892), 433.

"The wrongful seisin acquired by a disseissor gave him a real, though wrongful, estate, a 'tortious fee simple' valid as

against everyone but the person truly entitled, and capable of being made right and perfect by a release from that person to the person in actual seisin." (Pollock & Wright on Possession, 94.) This is very instructive. The law insisted on livery of seisin, but when once a person had been put in possession by this means he was capable of taking a release by deed of an estate in remainder. Here we see that the real owner could perfect the title of a disseissor by giving him a release, no livery of seisin being necessary.

The necessity of possession as a root of title explains the rule of common law which prevented a person from conveying to himself. "The ancient common law essayed to wield the land itself—'the most ponderous and immovable of all the elements.' Hence all its rules and forms regarded real property as more or less identified with actual possession. The single consideration that *livery* was the primitive mode of conveyance, for which other forms were but substitutes, and that a man could not deliver seisin to himself, explains many otherwise inexplicable doctrines." Hayes' Elementary View of Uses (1840), 80.

A person occupying land without any title has a devisable interest therein, and if he settles it by his will for successive estates those estates take effect as against a person who enters upon the land, and ejectment may be maintained accordingly. *Asher* v. *Whitlock,* supra.

And the interest of a mere possessor may also be inherited or conveyed. Moreover if the land be taken compulsory he is entitled to compensation. *Perry* v. *Clissold* (1907), Law Reports, Appeal Cases 73.

In the last cited case, the decision in *Doe d. Mary Carter* v. *Barnard* (1849), 13 Queen's Bench 945, was disapproved of as being inconsistent with *Asher* v. *Whitlock,* already cited, and with the views of Mr. Preston, Mr. Joshua Williams, Professor Maitland and Mr. Justice Holmes. The reporter adds a reference to an article by Professor J. B. Ames in the *Harvard Law Review,* vol. 3, p. 324(n). In the above cited case of *Doe* v. *Barnard* the plaintiff in ejectment, though having had thirteen

years' possession, failed in her action against a defendant (who had turned her out), on the ground that her own case shewed possession, and, therefore, a presumed fee simple, in her late husband, and shewed also that her husband left an heir. The plaintiff's possession was not connected with her husband's, and the defendant was allowed to set up the title of the heir in answer to the plaintiff's claim. As above shewn the case has been disapproved of.

If A, having no title, should acquire possession and hold it animo dominendi for say one year and then mortgage the property to B and remain in possession paying the interest, and then C, a stranger, acquired and held possession for less than 20 years, also animo dominendi, it would appear that B, the mortgagee (although neither he nor the mortgagor had obtained a title under the Statutes of Limitation) could eject C, since B would claim under the earlier possession. A's possession would be primâ facie evidence of his seisin in fee; would be capable of conveyance to his mortgagee, and the mortgagor's possession would be attributed to the mortgagee. Cole on Ejectment, 462, 479 (1857). (The mortgagee, in the case above put, would, of course, not be claiming adversely to the mortgagor.) A title would, therefore, be set up good as against all persons except the true owner proving right to immediate possession. Or if, in the simpler case, without there being any mortgage, A held peaceable possession for one year, and went out of possession, animo revertendi, and C took possession and held it for any period less than required by the Statutes of Limitations A could in like manner eject him in reliance on his (A's) earlier possession and presumed fee simple.

The case first put of there being a mortgage is exemplified by "*Doe* on the several demises of *Smith and Payne* v. *Webber* (1834), 1 A. & E. 119. The plaintiff Payne had been in possession for a number of years, though no statutory title was relied on. Then he mortgaged the property to the plaintiff Smith, but remained in possession, paying the interest on the mortgage. After the date of the mortgage the defendant brought ejectment under

some claim of title against the plaintiff Payne (who was still in possession) and the cause was submitted to arbitration, which went in favour of the defendant, who thereupon went into possession under a writ of habere facias possessionem and remained in possession for about six years before the action was brought. The defendant set up the award as against the plaintiff Smith, who was proved to have been present at the arbitration proceedings, but not to have taken any part in them. The evidence was ruled out as being res inter alios acta, and the plaintiff Smith obtained the verdict. All that the case decides is that the evidence was rightly rejected.

It would be interesting to know what direction was given by the trial judge to the jury, but it is not reported. The verdict seems, however, to have been right. The plaintiff Smith was deemed to be in possession by reason of his mortgagor's continued possession and payment of interest, and the defendant had not acquired a statutory title.

The effect of the case is thus given in Pollock and Wright on Possession: "Ten years' possession has been decisive even against several years' subsequent possession under colour of title."

As exemplifying at once the risks attending nisi prius practice and the necessity of some system of registration of title or of deeds, it appears that the defendant went to trial in ignorance of Smith's title, and had trained the evidence concerning the award against the plaintiff Payne. Then, discovering the mortgage, the defendant sought to deflect this evidence against the mortgagee, which was not allowed. The two plaintiffs appeared to have been working together in the action, and it was complained by the defendant's counsel that Payne was going behind the award by way of using Smith's name as a second plaintiff.

The minor, though none the less important, question of the costs of the evidence concerning the award was later dealt with, when the defendant was allowed such costs as against Payne, as costs of the issue found in favour of the defendant as against Payne, who, of course, could not succeed in face of the award.

The doctrine that possession is a root of title exists independently of the Statutes of Limitation. It is true that the judges, when speaking of a title by possession short of a statutory title, generally go on to say that the title is one that may ripen into an absolute title, but it seems clear that a possessory title would be recognized by the courts if there were no Statutes of Limitation. It would follow, therefore, in a case where no Statute of Limitation operated, that so long as a mere possessor was left in undisturbed possession by the true owner and those rightfully claiming under him, he, the possessor, would have a title recognized by the courts and one that would descend to his heirs or could become the subject of conveyance or devise, and would be good as against all the world except the true owner for the time being.

In conclusion it may be pointed out that where there have been several successive possessions by strangers to the title, the last possessor can take advantage of the prior possessions only if all the possessions have been continuous, and are connected as of right.—*University of Pennsylvania Law Review.*

CRIMINAL LAW AND THE JURISDICTION OF MAGISTRATES.

It is a well-known maxim that no one shall be put twice in peril for the same offence, but the recent decision of the Divisional Court in *Rex* v. *Simpson and others; Ex parte Smithson*, ante, p. 10, appears to have stretched the doctrine to a somewhat extraordinary length. The point raised in that case was whether a dismissal of a criminal information by a bench of justices, some of whom were by statute disqualified from adjudicating upon the particular case, could be quashed by certiorari. The court decided that it could not, the three learned judges who took part in the decision arriving thereat upon different grounds. Except for some decisions of the Irish Court of King's Bench, the point was apparently hitherto not covered by author-

ity. It has, of course, been repeatedly laid down that after a hearing and acquittal upon the merits by a court of competent jurisdiction, the defendant cannot again be tried upon the same charge. This was emphatically affirmed in the case of *Wemyss* v. *Hopkins,* 32 L.T. Rep. 9, in the Court for Crown Cases Reserved, and in *Reg.* v. *Miles,* 62 L.T. Rep. 572, by the Queen's Bench Division. In case of a conviction or acquittal by a court of competent jurisdiction, the defendant, if again charged with the same offence, may plead autrefois convict or autrefois acquit, as the case may be. So far as the English decisions are concerned, the maxim has been enunciated by the judges only in cases where there has been a trial by a competent court. Thus in *Reg.* v. *London Justices,* 25 Q.B. Div. 357, it was held that there was no appeal to quarter sessions by the prosecutor when an information has been dismissed under the Highway Act, 1835, although sec. 105 of that Act gives a right of appeal to anyone who thinks himself aggrieved by "any order, conviction, judgment, or determination." The case before the Divisional Court would appear to be distinguishable from those above referred to, because the petty sessional court which dismissed the information was not duly constituted. In *Reg.* v. *Antrim Justices* (1895), 2 Ir. 603, and certain other Irish decisions which were quoted during the course of the argument, it was held that where a defendant was acquitted after a hearing on the merits by a court of summary jurisdiction, the acquittal could not be quashed by certiorari, although some of the justices were disqualified for bias or interest, because the decision was not void, but merely voidable, so that the defendant was in peril thereunder until it could be set aside. The Irish courts appear to have been by no means unanimous, as appears by the judgment of Mr. Justice Holmes in the *Antrim* case. Whether the Irish decisions are right or wrong, it is disappointing to find the Divisional Court, having regard to the public and, indeed, constitutional importance of the point, refusing to give it more than a cursory consideration. Mr. Justice Ridley thought that the rule ought to be discharged, on the ground that in no case

could a man, once acquitted after a hearing on the merits, again be tried for the same offence. Mr. Justice Scrutton gave as the ground of his decision that he did not wish to prevent the defendants from pleading autrefois acquit, in case a fresh summons were issued against them, his judgment apparently involving a petitio principii; while Mr. Justice Bailhache seems to have been impressed chiefly by the absence of any English authority for the proposition put forward in favour of the rule. It is to be regretted that no more authoritative decision is available, for the case cannot, of course, go to a higher court, being a criminal matter.—*Law Times.*

PRINTERS' PRIVILEGE.

All who aid or counsel, direct or join in, the commission of a tort are joint tortfeasors. Hence a person who is injured by a printed libel sues the author, if he can discover him, and the printer jointly. If, as between the author and the person defamed, the libel is published on a privileged occasion, can the printer avail himself of the privilege? If he can, does express malice of the author expose the printer to liability?

These questions were discussed and decided by Mr. Justice Bankes in the case of *Smith* v. *Streatfeild and others* (109 L.T. Rep. 173; (1913), W.N. 263). The rector of a parish complained of the negligent performance by the plaintiff of his duties as one of the surveyors of ecclesiastical dilapidations of the diocese—a matter in which, if established, the rector and the rural deans of the diocese had a genuine interest. The rector wrote a letter on the subject, employed a firm of printers to print it, and sent a printed copy to each of the rural deans. In getting the letter printed he took a natural and proper means of circulating the letter among those who were interested in its contents. The letter contained statements defamatory of the surveyor in the way of his business, and he brought an action against the rector and the printers. As between the

rector and the rural deans the letter was published on a privileged occasion. The jury found that the rector was actuated by malice, but that the printers were not so affected. The question was whether the printers were liable.

It seems well settled that, so far as the author of a libel is concerned, he may publish the libel to a printer or to a shorthand clerk or typist, provided that this is an ordinary and usual course to adopt. "Independently of any authority," said Mr. Justice Mellor in *Lawless* v. *Anglo-Egyptian Cotton Company* (L. Rep. 4 Q.B. 262), "I am quite prepared to hold that a company having a great number of shareholders, all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report relating to the conduct of their officers to all shareholders whether present or absent, if the communication is made without malice and bonâ fide." Similarly, publication by a solicitor to his copying clerk of a letter written in the interests of his client, but containing defamatory statements, is not an actionable publication: (see *Boxsius* v. *Goblet,* 70 L.T. Rep. 368; (1894), 1 Q.B. 842). *Edmondson* v. *Birch and Co.,* 96 L.T. Rep. 415, (1907 1 K.B. 371), is to the same effect, where the managing director of a company, having occasion to make a confidential communication by cable to certain correspondents, dictated it to a clerk in their office, and it was held that this was not an actionable publication.

The liability of the printer, shorthand clerk, or typist for publication by them is a different question. Where the author of the libel can plead a privileged occasion, does his privilege cover the printer or clerk?

The learned judge held that the privilege of the rector covered all acts done in the natural and proper course and so enured to the benefit of the printers. In so holding, he followed the case of *Baker* v. *Carrick,* 70 L.T. Rep. 366, (1894), 1 Q.B. 838). In that case the defendants were a firm of solicitors acting for their clients, to whom the plaintiff owed a sum of money and who had commenced an action to recover it. The

plaintiff had placed certain goods in the hands of auctioneers for sale, and a sale of the goods had been advertised. The defendants, believing that the plaintiff had committed an act of bankruptcy, wrote to the auctioneers informing them of their surmise and directing them not to part with the proceeds of the sale. It was held that the communication to the auctioneers, being one which might properly have been made by the clients themselves, was properly made by the defendants in the course of their duty to them; and, there being no evidence of malice, judgment was given for the defendants. It seems to follow from this decision that a communication which may lawfully be made by a party to a litigation may lawfully be made by his solicitor acting on his instructions or otherwise in the course of his duty to his client. Does it follow that all that may be lawfully written by one man to others having a common interest with him on a particular matter may be lawfully printed by a firm of printers acting on his instructions? According to *Smith* v. *Streatfeild,* the answer is Yes, if the persons sharing in the common interest are so numerous as to make the printing of the defamatory matter a natural and proper means of communication. This view is not unsupported by authority. In *Mangena* v. *Wright,* 100 L.T. Rep. 960, (1909) 2 K.B. 958, a defamatory statement in the *Times* newspaper was held to have been published on a privileged occasion where the matter was of public interest as to which the public were entitled to information, and a newspaper was the ordinary channel by means of which the communication could be made public. But we must not delude ourselves into the belief, that from the decision of *Baker* v. *Carrick,* we glide imperceptibly to the conclusion arrived at in *Smith* v. *Streatfeild.*

The duty which a printer owes to his customer bears hardly any analogy to the duty which a solicitor owes to his client. The relation of solicitor to client is part of the machinery for the administration of justice. Great injustice might be suffered if a person who has been, or conceives himself to have been, subjected to a legal injury could not retain the services

of a solicitor because the proper conduct of his case might necessitate the publication of defamatory statements which might involve the solicitor in a lawsuit. This is the real reason why defamatory communications made by a solicitor in the course of his duty to his client are privileged. The duty of a printer to his customer is imposed and undertaken simply by the contract between the parties and for the printer's own profit. If a printer should decline to print a circular on the ground that it contained defamatory statements, no injury to the public is involved comparable to the denial of justice which might result if a solicitor should refrain from writing a letter in the interest of his client because it was uncomplimentary to other persons. In truth, the gap between *Baker* v. *Carrick* and *Smith* v. *Streatfeild* is a wide one—too wide to be spanned by human symmetry. The latter decision may be a good and wise one, but, in so far as it rests on the earlier as an authority, it seems to be based on a false analogy. The real road is through *Mangena* v. *Wright* and not through *Baker* v. *Carrick*.

Having decided that the privilege of the rector enured to the benefit of the printers, Mr. Justice Bankes further held that the malice of the former destroyed the privilege not only for him, but for the printers also. It follows from this that the printers have no privilege of their own, but can only shelter themselves behind the privilege of the author of the libel they array themselves in his armour, and take his accoutrements with all faults. This, again, seems to distinguish the principle of *Smith* v. *Streatfeild* from that of *Baker* v. *Carrick*. It is not by any means clear that the privilege of a solicitor would cease to protect him if his client in giving him instructions to write a letter should chance to be actuated by malice.—*Law Times.*

The new Lord Chief Justice of England has had a career well described by that much-abused word "romantic." As a boy, he left the home of his father, a merchant in London, to go to sea; where he served before the mast. After this he went on the Stock Exchange, where fortune was not kind to him, and at twenty-four nothing but his mother's persuasion prevented his emigration to the United States. Then he studied law, and in 1887 he was called to the Bar by the Middle Temple. Success came to him quickly in this new sphere, and his mastery of figures, in particular, earned him a high reputation. As a cross-examiner he has been supreme. He entered the House of Commons, as Liberal Member for Reading, in 1904; six years later he became Solicitor-General, and soon afterwards Attorney-General. He was the first holder of the last-named office to be included in the Cabinet.

The *Law Times* criticises freely the proposal of the English Government to substitute a Ministry of Lands, with its officials, for the courts of law, and hopes that if any such measure is placed upon the statute book, the control of the Judiciary over the Executive will be maintained in its entirety. The writer very properly characterises as "monstrous" the suggestion that practically all disputes that might arise relating to land should be referred to a "Court" of departmental officials and be taken away from the ordinary courts of the land. It will certainly be a sorry day for England and would be for any other country if litigants were compelled to seek justice, not from impartial judges, but from men who hold their position at the beck and call of changing politicians and subject to influences which cannot come within the walls of a Court of Justice. This evil change from the old state of things which has so much conduced to British freedom and fair play has been too much in evidence lately and is greatly to be deplored.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

ADMIRALTY—SHIP—COLLISION—REGULATIONS FOR PREVENTING COLLISIONS, ART. 28—SUDDEN EMERGENCY—OMISSION TO GIVE SOUND SIGNAL.

The Tempus (1913) P. 166. In this case it was held by Evans, P.P.D., that where a ship in a sudden emergency, occasioned by the faulty navigation of another vessel, altered its course in an attempt to avoid a collision without giving the sound signal required by Art. 28 of the Regulations for Avoiding Collisions, which neither caused nor contributed to the collision which took place, such omission was not in the circumstances a breach of the rule.

ANCIENT LIGHTS—ALTERATION OF BUILDINGS ON SERVIENT TENEMENT—NO DIMINUTION IN TOTAL AMOUNT OF LIGHT—NO DAMAGE.

Davis v. *Marrable* (1913) 2 Ch. 421. This was an action to restrain interference with an ancient light. The servient tenement had been altered with the result that, although it was made higher in one part, it was lower in another, so that, in effect, there was in fact no diminution in the total amount of light coming to the dominant tenement. Joyce, J., was therefore of the opinion that the defendants were entitled to credit for the increased light occasioned by lowering the building as against the obstruction caused by the part of the building which had been heightened, but having received this credit it would not be open to the defendant hereafter to restore the lowered part of his building to its former height. That the right to ancient light enjoyed by the dominant tenement was a negative easement over the whole tenement, but did not give the plaintiff any property or right in any particular cones or pencils or rays of light coming in any particular direction and, therefore, the varying of the sky line of the servient tenement over which the ancient light came, gave no right of action provided the alteration did not occasion an actionable nuisance within the decision in *Colls* v. *Home & Colonial Stores*, 1904, A.C. 179. He therefore dismissed the action, but, having regard to the novelty and difficulty of the case, and the fact that the defendants had rushed on their building the moment

they had notice of the plaintiff's complaint, and got it completed on the Sunday before the plaintiff's application to the Court, he gave them no costs.

INJUNCTION—BUILDING IN STREET—BUILDING LINE—REFUSAL TO CONFORM TO BUILDING LINE—MANDATORY INJUNCTION.

Attorney-General v. *Parish* (1913) 2 Ch. 444. In this case the defendant owned a house on a street, and being desirous of pulling it down and erecting another on its site, deposited plans with the municipal authority for approval. He was notified that the municipal authority had adopted a general building line for the whole street which cut off a considerable slice off the defendant's house, and it therefore did not approve of the defendant's plan. Correspondence ensued in which the defendant insisted on rebuilding on the old site and completed the building. The municipal authority did not give him any notice of the particular section of the Act under which they were acting, nor did it tender compensation, but commenced this action to compel the defendant to pull down that part of the building which was in advance of the building line which had been adopted. Joyce, J., who tried the action, dismissed it with costs, but the Court of Appeal (Cozens-Hardy, M.R., Kennedy, and Eady, L.JJ.), held that the plaintiffs were entitled to the relief claim and ordered the defendant to pull down the part of the building as prayed, but having regard to "the ignorance and blunders" of the plaintiffs, which to a large extent occasioned the difficulty, while they gave them the costs of the appeal, they refused them the costs of the action.

ACTION BY LANDOWNER FOR TRESPASS—ALLEGED RIGHT OF WAY —RESOLUTION OF MUNICIPAL AUTHORITY TO DEFEND ACTION —MUNICIPAL AUTHORITY ACTED AS DEFENDANT—PLEADING —MOTION TO STRIKE OUT PLEADING AS EMBARRASSING.

Thornhill v. *Weeks* (1913) 2 Ch. 464. This was an action to strike out a pleading as embarrassing. The action was brought to restrain certain persons from passing over a certain premises, in the assertion of an alleged right of way. The municipal authority of the district in which the property was situate passed a resolution to defend the action and were made defendants. With a view to avoiding liability for costs they, by their defence, denied that they threatened or intended to exercise the right of way, and pleaded that they had neither asserted nor denied the existence of the right of way. It was held by Neville, J., that this

did not infringe any rule of pleading and the motion was refused, and with this decision the Court of Appeal (Cozens-Hardy, M.R., and Kennedy, L.J.), agreed, they being of the opinion that the pleading would not in any way save the defendants from a liability for costs if the plaintiff established his case.

INJUNCTION—DOCUMENTS—PRIVILEGE—RESTRAINT OF PUBLICATION—DOCUMENTS OBTAINED BY TRICK—COPIES OF DOCUMENTS IMPROPERLY OBTAINED.

Ashburton v. *Pape* (1913) 2 Ch. 469. In this case certain communications by the plaintiff to his solicitor were obtained by the defendant in the following circumstances:—The defendant, who was a bankrupt, issued a subpœna *duces tecum* to the plaintiff's solicitor's clerk to produce the letters in question in the bankruptcy proceedings. The clerk attended on the subpœna and took the documents with him, and whilst in attendance he complained of not feeling well, and handed over the letters to the defendant and left the Court. The defendant's solicitors then took copies of the letters and gave the originals back to the defendant. On the plaintiff's present solicitors hearing of what had taken place, an order was made, by Neville, J., on the plaintiff's application, requiring the delivery up of the originals, and restraining the defendant and his solicitors from publishing or making use of any copies of such letters, "except for the purpose of the pending proceedings in the defendant Pape's bankruptcy"; from this order the plaintiff appealed so far as the exception was concerned, and the Court of Appeal (Cozens-Hardy, M.R., and Kennedy and Eady, L.JJ.), allowed the appeal and ordered the exception to be struck out, holding that for no purpose whatever was the defendant entitled to use privileged documents obtained in such circumstances. And the fact that the copies might have been used as secondary evidence at a trial, though improperly obtained, was held to be no ground for refusing the plaintiff the relief he asked, and which would prevent their use as secondary evidence.

TRUSTEE AND CESTUI QUE TRUST—BREACH OF TRUST—APPROPRIATION OF SECURITY BY DEFAULTING TRUSTEE TO MEET BREACH OF TRUST—DECLARATION OF TRUST—EQUITABLE MORTGAGE—IRREVOCABLE DECLARATION—STATUTE OF FRAUDS (29 CAR. 2 C. 3) S. 7.

In re Cozens, Green v. *Brisley* (1913) 2 Ch. 478. This was a summary application to determine whether the estate of a de-

faulting trustee had been effectually charged by him with the payment of moneys misappropriated, belonging to the trust estate. The only evidence in favour of the contention was certain memoranda in the books of the deceased, which contained entries of the amounts misappropriated, and against which "Ecc." was set, which was admitted to mean "Ecclesbourne," the name of a house owned by the deceased. There were other similar entries in pencil, which appeared to have been changed. Neville, J., who tried the action, came to the conclusion that none of the entries relied on constituted a sufficient writing within the Statute of Frauds, s. 7, nor did they indicate any present and irrevocable intention on the part of the deceased to declare himself a trustee of the Ecclesbourne property in respect of the moneys misappropriated. In his opinion the entries indicated an intention to create a charge by deposit of deeds which was never fulfilled; and further that the entries were in the nature of trial entries subject to alteration as might suit the interest of the deceased. Therefore, he concluded no effectual charge had been created.

WILL—MISDESCRIPTION—FALSA DEMONSTRATIO.

In re Mayell Foley v. *Wood* (1913) 2 Ch. 488. In this case a testator had by his will devised "My two freehold cottages . . . Nos. 19 and 20, Castle St." He did not own and never had owned 19 and 20, Castle St., but he did own at the time of the will and at his death "Nos. 19 and 20, Thomas Street," and it was held by Warrington, J., that "Castle Street" ought to be rejected as *falsa demonstratio* merely, and that Nos. 19 and 20, Thomas Street, passed by the devise.

ADMINISTRATION—LEASE BY TESTATOR—COVENANT BY LESSOR —SPECIFIC DEVISE OF REVERSION—LIABILITY FOR PERFORMANCE OF COVENANT AFTER LESSOR'S DEATH.

In re Hughes Ellis v. *Hughes* (1913) 2 Ch. 491. The facts in this case were as follows. A testator had in 1901, demised certain freehold premises for pottery works, for fourteen years at a rent of £120, and he covenanted in the lease that he would, if required by the lessees during the term, build an additional oven, etc., according to a plan to be made, the lessees paying therefor an additional rent of £10 per cent. per annum on the gross outlay. Part of the new works were erected in the testator's lifetime, but disputes having arisen, nothing further was done. The testator died in 1909, having, by his will, specifically

devised the demised premises. In 1911, the lessees required the executors to complete the works, and on a reference to arbitration, the arbitrator awarded that the executors should erect the works on part of the demised premises. The question on the present proceeding was, whether the cost of erecting the works must be borne by the specific devisee or by the general estate of the testator. Warrington, J., held that the obligation imposed by the covenant was not one in its nature incident to the relation of landlord and tenant, but was preparatory to the complete establishment of that relation and, therefore, according to the law laid down in *Eccles* v. *Mills* (1898) A.C. 360, was one which as between the specific devisee and the general estate, must be borne by the latter.

SETTLEMENT—LIMITATION TO SETTLOR FOR LIFE WITH ULTIMATE LIMITATION TO HIS "HEIR AT LAW"—CONSTRUCTION—RULE IN SHELLEY'S CASE.

In re Davison, Davison v. *Munby* (1913) 2 Ch. 498. In this case the construction of a marriage settlement was in question, whereby the settlor conveyed certain freehold property to trustees to hold in trust for her during her life and, after her death, in trust for such person as she should by will appoint, and in default of appointment, in trust for "the heir at law" of the settlor. It was contended that the rule in *Shelley's* case applied, and that the settlor took a fee, but Warrington, J., held that the limitation to the "heir at law" was not equivalent to a limitation to heirs, and therefore the rule in *Shelley's* case did not apply, and that under the limitation, the person who, at the death of the settlor, answered the description of her heir at law, took an estate for life, and that there was a resulting trust in favour of the settlor. In considering this case the provisions of The Conveyancing and Property Act (1 Geo. V. c. 25, s. 5 Ont.) have to be taken into account.

TENANT FOR LIFE AND REMAINDERMAN—WILL—TRUST FOR CONVERSION—POWER TO POSTPONE CONVERSION—RESIDUE—ESTATE PUR AUTRE VIE—POLICIES ON LIFE OF CESTUI QUE VIE—PREMIUMS, WHETHER PAYABLE OUT OF CAPITAL.

In re Sherry, Sherry v. *Sherry* (1913) 2 Ch. 508. In this case a testator had devised his residuary real and personal estate to trustees upon trust for conversion (but with power to postpone conversion), and to pay the income thereof to his widow for life, and

after her death to divide his estate among his six children. Part of the residuary estate consisted of an estate *pur autre vie* in a certain fund which produced £244 a year; and also two policies for £1,000 and £750 on the life of the *cestui que vie*. The premiums on these policies amounted to £60. The whereabouts of the *cestui que vie* were unknown and it was not certain whether he was alive, he having disappeared some years ago. The question was, whether the trustees could, in the circumstances, postpone conversion of the estate *pur autre vie*, and the policies. The present surrender value of the latter was £380, and to offer the estate *pur autre vie* for sale in the absence of being able to prove that the *cestue que vie* was alive, would, as the judge found, be ruinous. Warrington, J., in these circumstances, held that the trustees were justified in postponing conversion, and that the widow was entitled to the full amount of the income from the estate *pur autre vie*, and that the life policies were reversionary interests, which, when they fell in, would form capital, and that the premiums for keeping them alive must be paid out of capital.

BUILDING SCHEME—RESTRICTIVE COVENANT—ALTERATION OF CHARACTER OF DISTRICT—BREACH OF COVENANT—INJUNCTION.

Sobey v. *Sainsbury* (1913) 2 Ch. 513, was an action to enforce by injunction, a restrictive covenant made by a purchaser of land laid out as a building scheme. The deed was made to a society which purchased part of the land included in the scheme, and contained a covenant by the grantees against the erection or use of buildings on the estate other than as private dwellings, professional premises, or lodging houses. This deed was made in 1888, and the vendor bound himself in like manner not to erect, or suffer to be erected, buildings on the rest of the estate other than of the character above-mentioned. Between 1888 and the commencement of the action, beginning about 1890, there had been an enormous increase of population, and a corresponding change had taken place in the character of the road on which the property in question fronted; and a hotel and many shops had been erected, and what had previously been private houses had been turned into shops, and the character of the neighbourhood had been changed, and it had ceased to be residential. The defendant proposed to erect a shop on the property in question and the plaintiff refused to consent to his doing so, except on the terms of his paying £100, which the defendant refused to pay, whereupon the plaintiff brought the present action to restrain

him from erecting a shop. The defendant, by his defence, set up that there had been such a change in the character of the neighbourhood that the object for which the covenant had been entered into had completely disappeared and that such change had been to a great extent brought about by the acts and omissions of the plaintiff and his predecessors in title. Sargant, J., who tried the action, was of the opinion that the plaintiff's own breaches of the agreement as to building were sufficient to disentitle him to an injunction against the defendant, and, moreover, that the changed condition of the neighbourhood was also a sufficient ground for denying him the equitable relief he claimed and he dismissed the action with costs.

INSURANCE (MARINE)—CONSTRUCTION — COLLISION CLAUSE IN POLICY—"COLLISION . . . WITH SHIP OR VESSEL"—COLLISION WITH NETS OF FISHING VESSEL.

Bennett SS. Co. v. *Hull Mutual SS. Protecting Co.* (1913) 3 K.B. 372. In this case the construction of a clause in a Lloyds' policy, issued by the defendants, was in question. The clause in question covered "collision with any other ship or vessel." The anchor of the plaintiff's ship, which was the subject of the policy, and its propeller became entangled in the nets of a fishing vessel, which was a mile away, but the plaintiffs' vessel did not at any time come into contact with the fishing vessel. The plaintiffs, with the consent of the defendants, paid the owners of the nets for the damage caused by the plaintiffs' vessel thereto, without prejudice to the question whether the defendants were liable to indemnify the plaintiffs therefor under the policy. Pickford, J., who tried the action, held that there had been no collision with a ship or vessel within the meaning of the policy, and, therefore, that the defendants were not liable to indemnify the plaintiffs for the moneys paid by them to the owners of the nets.

MARINE INSURANCE—INSURANCE OF CARGO AGAINST CAPTURE—ANTICIPATED CAPTURE—NOTICE OF ABANDONMENT—SALE OF CARGO BY ASSURED—LOSS ARISING ON SALE.

Kacianoff v. *China Traders Insurance Co.* (1913) 3 K.B. 407. This was an action on a policy of marine insurance to recover as for a constructive total loss. The plaintiffs were Russian subjects and they insured with the defendants a cargo of salt meat

from San Francisco to Vladivostok. During the currency of the policy, war broke out between Russia and Japan, and the Japanese fleet in the Pacific were capturing vessels, and they were also blockading Vladivostok. The defendants telegraphed to the plaintiffs that if the cargo were sent to Vladivostok via Nagasaki they would take up the position that the plaintiffs had deliberately caused any loss occasioned by the perils insured which were *inter alia* loss by capture. The cargo was therefore not sent and the plaintiffs proposed that the cargo should be discharged at San Francisco and sold elsewhere, and ultimately notice of abandonment was given to the defendants who refused to accept. The cargo was ultimately discharged at San Francisco for sale and delivery at Shanghai. The plaintiffs claimed to recover the value of the cargo after deducting what was realized by the sale at Shanghai, on the ground that there had been a constructive total loss. The defendants contended that there had been no loss by a peril insured against. Pickford, J., who tried the action, came to the conclusion that it was impossible to say that the cargo had been constructively totally lost because if it had been sent to the destination intended it might have been captured, and he therefore held that the action failed.

INSURANCE—PLATE GLASS—DAMAGE "CAUSED DIRECTLY BY OR ARISING FROM CIVIL COMMOTION OR RIOTING"—BREAKING WINDOWS BY DISORDERLY WOMEN.

London & Manchester Plate Glass Co. v. *Heath* (1913) 3 K.B. 411, is a case arising out of the disorderly behaviour of a class of women called "Suffragettes." The plaintiffs were insurers of plate glass windows and had re-insured some of their risks with the defendant, the insurance was against damage caused directly by, or arising from, civil commotion or rioting. In March, 1912, a large number of suffragettes simultaneously broke plate glass windows in different quarters of London and among them the subjects of the insurance. The plaintiffs claimed that this outbreak of disorder was a civil commotion or rioting within the meaning of the policy. Bucknill, J., who tried the action, held that there was no evidence that the damage was caused directly by, or arose from, civil commotion or rioting, and dismissed the action, and with this conclusion the Court of Appeal (Williams, Buckley, and Hamilton, L.JJ.) agreed. The Court adopted Lord Mansfield's definition of a "civil commotion" as being "an insurrection of the people for general purposes, though it may not amount to a rebellion, where there is usurped power."

The damage in question having been done quietly and deliberately as appeared by the evidence and without any commotion, the loss was not within the peril insured against.

PARISH COUNCIL—CHAIRMAN—DURATION OF OFFICE—NEW COUNCIL—ANNUAL MEETING—RIGHT OF CHAIRMAN TO VOTE AT ELECTION OF HIS SUCCESSOR.

The King v. *Jackson* (1913) 3 K.B. 436 involves a simple question. By statute it was provided that a parish council was to consist of chairman and councillors and that at the annual meeting the parish council shall elect from councillors or persons qualified to be councillors, a chairman "who shall . . . continue in office until his successor is appointed." A parish council elected a chairman who at the next election of parish councillors was not re-elected. At the annual meeting of the new council, however, he presided as chairman. A qualified person was proposed for chairman of the new council. The chairman voted for him and on there being a tie he was elected on the chairman's casting vote. On an application to set aside the election the Divisional Court (Ridley, Pickford and Atkin, JJ.) held that the chairman of the old council continued in office under the statute until his successor was appointed and he was entitled to vote as he had done. The election was therefore upheld.

NUISANCE—VARIOUS COMPANIES HAVING MAINS UNDER STREETS—DAMAGE TO ELECTRIC CABLES BY BURSTING OF HYDRAULIC MAINS—STATUTE—CONSTRUCTION—TWO ACTS TO BE CONSTRUED AS ONE ACT.

Charing Cross W.E. & C. Electricity Supply Co. v. *London Hydraulic Power Co.* (1913) 3 K.B. 442. In this case the plaintiffs by virtue of statutory powers had laid electric cables under certain public streets and the defendants, also by virtue of statutory powers, had laid hydraulic mains under the same streets. The defendants' mains burst and damaged the plaintiffs' cables and this action was brought to recover for the damage so occasioned. Some of the defendants' mains had been laid under an Act which did not contain the usual clause that nothing in the Act should exempt the defendants from liability for nuisance, the other mains had been laid down under the authority of a later Act which did contain that clause and which provided that the two Acts should be read and construed together as one Act. The bursting of the

mains was not due to any negligence of the defendants, but was due to a subsidence of the soil which the judge found could not by any reasonable care have been detected before the mains burst. Scrutton, J., however, who tried the case, held that, notwithstanding these findings, the defendants were, on the principle established by *Fletcher* v. *Rylands*, L.R. 3 H.L. 330, liable to the plaintiffs for the damage they had sustained; because the two Acts being read as one Act, the clause above referred to applied to both Acts and prevented the defendant from claiming statutory authority for causing the damage complained of, and the gradual subsidence of the soil by wear and tear of heavy traffic was not "an act of God," nor was it occasioned by the plaintiffs, nor by the malicious act of any third person, and therefore, none of the exceptions to the case of *Fletcher* v. *Rylands* existed.

TELEGRAPH—PLACING POSTS AND WIRES IN OR ACROSS PUBLIC STREETS—CONSENT OF BODY HAVING CONTROL OF STREET.

Postmaster-General v. *Hendon* (1913) 3 K.B. 451. By a statute it was provided that a company shall not place a telegraph over, along or across a public street "except with the consent of the body having the control of such street." It was held in this case by the Railway and Canal Commission, (Bankes, J., and Sir Jas. Woodhouse) that an urban district council not being liable to repair a road over which it was proposed to place telegraph posts, was not the body "having the control thereof."

CRIMINAL LAW—EVIDENCE—BREAKING INTO A HOUSE WITH INTENT TO RAVISH—EVIDENCE THAT SHORTLY AFTERWARDS ACCUSED BROKE INTO ANOTHER HOUSE AND HAD CARNAL INTERCOURSE WITH ANOTHER WOMAN.

The King v. *Rodley* (1913) 3 K.B. 468. This was an appeal from a conviction for breaking into a house with intent to ravish a woman. Evidence was tendered that after the accused had been repulsed from the house in question, he had gone to another house about three miles from the prosecutrix's house and had broken in and had carnal knowledge of another woman there, with her consent. It was claimed that this evidence was admissible as showing the state of mind and purpose for which he had entered the prosecutrix's house, but the Court of Criminal Appeal (Laurence, Bankes and Atkin, JJ.) held it to be inadmissible and quashed the conviction.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

SUPREME COURT.

From Gov.-Gen. in Council.] [Oct. 14.

IN RE SECTIONS 4 AND 70 OF CANADIAN INSURANCE ACT, 1910.

Constitutional law—Insurance—Foreign company doing business in Canada—Dominion license.

Held, per Fitzpatrick, C.J. and Davies, J.—That ss. 4 and 70 of 9 & 10 Edw. VII. c. 32 (the Insurance Act, 1910) are not *ultra vires* of the Parliament of Canada, Idington, Duff, Anglin and Brodeur, JJ., *contra.*

Held, per Fitzpatrick, C.J., and Davies, J.—That s. 4 of Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada if it does not hold a license from the Minister under the said Act and if such carrying on of the business is confined to a single province.

Per Idington, J.—Sec. 4 does so prohibit if, and so far as it may be possible to give any operative effect to a clause bearing upon the alien foreign companies as well as others within the terms of which is embraced so much that is clearly *intra vires.*

Per Duff, Anglin and Brodeur, JJ.—The section would effect such prohibition if it were *intra vires.*

Newcombe, K.C., and *Lafleur*, K.C., for Attorney-General of Canada.

Nesbitt, K.C., *Aimé Geoffrion*, K.C., *Bayly*, K.C., and *Christopher C. Robinson*, for Ontario, Quebec, New Brunswick and Manitoba.

S. B. Woods, K.C., for Alberta and Saskatchewan. *Wagenest*, for the Manufacturers' Association of Canada. *Gandel*, for the Canadian Insurance Federation.

From Gov.-Gen. in Council] [Oct. 14.

IN RE INCORPORATION OF COMPANIES.

Constitutional Law—Incorporation of companies—B.N.A. Act—Provincial objects—Limitation—Doing business beyond the Province—Insurance company—9 & 10 Edw. VII. c. 32, s. 3, s.s. 3—Enlargement of company's powers—Federal company—Provincial license—Trading companies.

By sub-s. 11, s. 92, of The British North America Act, 1867, the legislature of any province in Canada has exclusive juris-

diction for "The Incorporation of Companies with Provincial Objects."

Held, per Fitzpatrick, C.J. and Davies, J.—That the limitation defined in the expression "Provincial Objects" is territorial and also has regard to the character of the powers which may be conferred on companies locally incorporated.

Per Idington, Duff, Anglin and Brodeur, JJ.—That such limitation is not territorial but has regard to the character of the powers only.

Per Fitzpatrick and Davies, J.—That a company incorporated by a Provincial legislature has no power or capacity to do business outside of the limits of the incorporating Province but it may contract with parties residing outside those limits as to matters ancillary to the exercise of its powers.

Per Idington, Anglin and Brodeur, JJ.—Such company has, inherently, unless prohibited by its charter, the capacity to carry on the business for which it was created, in any foreign state or Province whose laws permit it to do so.

Per Duff, J.—A provincial company may conduct its operations outside the limits of the Province creating it so long as its business as a whole remains provincial.

Per Fitzpatrick, C.J. and Davies, J.—That a corporation constituted by a provincial legislature with power to carry on a fire insurance business with no limitation as to locality has no power or capacity to make and execute contracts for insurance outside of the incorporating province or for insuring property situate outside thereof.

Per Idington, Duff, Anglin and Brodeur, JJ.—Such a company has power to insure property situate within or without the incorporating province and to make contracts within or without the same to effect any such insurance. In respect to all such contracts it is not material whether the owner of the property insured is, or is not, a citizen or resident of the incorporating Province.

Per Fitzpatrick, C.J. and Davies, J.—A provincial fire insurance company may make contracts and insure property throughout Canada by availing itself of the provisions of s. 3, sub-s. 3, of 9 & 10 Edw. VII. c. 32 ("The Insurance Act, 1910") which is *intra vires* of the Parliament of Canada.

Per Duff and Brodeur, JJ.—Such enactment is *ultra vires* of Parliament.

Per Idington, J.—Part of said sub-section may be *intra vires* but the last part providing for a Dominion license to local companies is not.

Per Anglin, J.—The said enactment is *ultra vires* except in

so far as it deals with companies incorporated by or under Acts of the legislature of the late Province of Canada.

Held, that the powers of a company incorporated by a provincial legislature cannot be enlarged either as to locality or objects, by the Dominion Parliament nor by the legislature of another Province.

Per Fitzpatrick, C.J. and Davies, J.—The legislature of a province has no power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province without obtaining a license so to do from the provincial authorities and paying fees therefor unless such license is imposed in exercise of the taxing power of the province. And only in the same way can the legislature restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special trading powers or limit the exercise of such powers within the province. Duff and Brodeur, JJ., *contra*.

Per Idington, J.—A company incorporated by the Dominion Parliament in carrying out any of the enumerated powers contained in s. 91, and a company incorporated for the purpose of trading throughout the Dominion cannot be prohibited by a provincial legislature from carrying on business, or restricted in the exercise of its powers, within the province except by exercise of the exclusive jurisdiction to make laws in relation to "direct taxation within the Province." But a company incorporated under the general powers of Parliament must conform to all the laws of a Province in which it seeks to do business.

Per Anglin, J.—The provincial legislature may impose a license and exact fees from any Dominion company if the object be the raising of revenue, or obtaining of information, "for provincial, local or municipal purposes" but not if it is to require the company to obtain provincial sanction or authority for the exercise of its corporate powers. And the legislature cannot restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special powers nor limit the exercise of such powers within the province, nor subject such company to legislation limiting the nature or kind of business which corporations not incorporated by it may carry on or the powers which they may exercise within the province.

Newcombe, K.C., and *Atwater*, K.C., for Attorney-General of Canada.

Nesbitt, K.C., *Lafleur*, K.C., *Aimé Geoffrion*, K.C., and *Christopher C. Robinson*, for Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba.

S. B. Woods, K.C., for Alberta and Saskatchewan.

Chrysler, K.C., for Manufacturers' Association of Canada.

EXCHEQUER COURT.

Cassels, J.] [Oct. 11.

IN RE LEONARD.

Patent of invention—Feeds for grain, ore and mineral separators—Appeal from decision of Commissioner under 3-4 Geo. V. c. 17—Grounds for refusal to grant patent.

This was an appeal by William Leonard, from a decision of the Commissioner of Patents, refusing an application for a patent of invention.

More than two years before the application for the patent in question on the appeal, the applicant had obtained Canadian letters-patent No. 110156 for feeds for grain, ore and mineral separators. The specification of the former patent after declaring that the old method of separating materials, such as gold and ore, cereals and seeds, by delivering them into a vertical spout from a connecting inclined spout and forcing a current of air upward through the vertical spout was ineffective, disclosed the nature of his invention as follows:—

"I have found that, by delivering the materials in a horizontal plane or directly across the vertical spout and therefore at right angles to the ascending air current, they are spread out in a thinner sheet so that the air current acts thereon more effectively, or, in other words, forces upward and separates the lighter materials from the heavier in a more perfect manner than is practicable when the materials are discharged in a downward direction."

The substance of the invention claimed in the former patent was the delivering of the materials in a horizontal plane, or directly across the vertical spout, and therefore at right angles to the ascending current of air.

Held (affirming the decision of the Commissioner), that by the specification to his former patent the applicant had disclosed the invention now claimed, and the same must be taken to have been abandoned and dedicated to the public.

(2) A former patent, while in force, operates as a bar to the application for a new patent, and the only remedy open to the applicant, if he is in a position to invoke it, is to apply for a reissue of the former patent.

Observations on desirability of Commissioner being represented by counsel on appeals from his decisions refusing to grant patents.

Barnett-McQueen Co. v. *Canadian Stewart Co.* (13 Ex. C.R. 186), distinguished.

R. S. Smart, for appellant.

Nem. con.

EXCHEQUER COURT.

Cassels, J.] [Oct. 23.

IN RE GEBR NOELLE, A GENERAL TRADEMARK.

Trademark and Design Act (R.S. 1906, *c.* 71), *s.* 4 (*a*) *and* (*b*) *—Interpretation—General and specific trademarks—Definition.*

This was an application for general trademark.

Under the language of s. 4, sub-s. (*a*) of the Trademark and Design Act (R.S. 1906, c. 71), a general trademark means a trademark used in connection with the various articles in which the proprietor deals in this trade, and may cover several classes of merchandise of the proprietor is trading in their several classes.

On the other hand, under sub-s. (*b*), a specific trademark is limited to a class of merchandise of a particular description, so if the applicant deals in two different classes of merchandise, he must apply for two specific trademarks, one applicable to each class.

While a general trademark would cover all the classes of merchandise in which the applicant deals, it would not confer an unlimited right to the mark the world over as against anyone carrying on an entirely different business who applies for a specific trademark consisting of the same mark as applied to goods not manufactured by the owner of the general trademark.

W. L. Scott, for applicant; *R. V. Sinclair,* for Minister of Agriculture.

Book Reviews.

The Law Quarterly Review. Edited by RT. HON. SIR FREDERICK POLLOCK, Bart., D.C.L., LL.D., October. London: Stevens & Sons, Limited, 119 and 120 Chancery Lane.

The contents of this number are as interesting as usual. In addition to the notes there are papers upon the following sub-

jects: The laws of the Anglo-Saxons, Powers and the rule against perpetuities, Legal education: academical and professional, The Chief Clerks in Chancery and their predecessors, Notice and fraud in land registries, The origin of the law of sale, English and Scottish bankruptcies, A law reform movement in Germany, and Book Reviews.

The Lawyers' Reports, Annotated. N.S. Book 43. Rochester, N.Y.: The Lawyers' Co-Operative Publishing Co. 1913.

This excellent mine of legal information, up-to-date and complete, comes with unfailing promptitude. We commend it to the practising lawyer.

Outlines of the law of Landlord and Tenant. By EDGAR FOA, Barrister-at-law. London: Stevens & Sons, Bellyard. 1913.

The author is a lecturer of the Council of Legal Education in England and thoroughly competent to give these outlines, which are designed especially for the use of students.

Bench and Bar

THE LATE SIR ÆMELIUS IRVING, K.C., LL.D., TREASURER OF THE LAW SOCIETY OF UPPER CANADA.

A notable figure at Osgoode Hall, Toronto, has passed off the scene. Sir Æmelius Irving had been Treasurer of the Law Society of Upper Canada since 1893, succeeding the Hon. Edward Blake, who in that year entered the British House of Commons.

The late Treasurer was born in 1823, being the son of Hon. Jacob Æmelius Irving, an officer of the 13th Light Dragoons. He was born at Leamington, England, his mother being a daughter of Sir Jere Homfray of Glamorganshire, Wales. The family came to Canada in 1834.

Sir Æmelius was educated at Upper Canada College, called to the Bar in 1849, made a Q.C. in 1863, and elected a Bencher of the Law Society in 1874, becoming Treasurer in 1893. He was for some years Clerk of the Peace of the County of Waterloo, subsequently removing to Hamilton, where he practised his profession, afterwards coming to Toronto. In 1874 he was

elected to the House of Commons as a member of the Liberal Party, but losing his seat at the next election. He received the honour of Knighthood in 1906.

Sir Æmelius was a sound and well-read lawyer, especially in constitutional matters, being engaged in many important cases, though his general counsel business was not very extensive. He was Counsel for the Province of Ontario in many of these, such as the arbitration over disputed accounts between the Dominion and Provinces of Ontario and Quebec, the Ontario Fisheries case before the Privy Council, etc. For many years he was often called upon to act for the Crown in criminal matters.

As Treasurer of the Law Society he was unremitting in his labours, and his strong common sense, business capacity and precise method of conducting matters which came before him was fully recognized by his colleagues of the Bench.

The weight of years rested lightly upon his vigorous frame and his well-known figure, passing away at the ripe age of 90 years, his kindly face, his courteous manner and his dignified, gentlemanly bearing will long be remembered at Osgoode Hall. He was a fine specimen of an English gentleman, high minded, exact in all his business relations, always courteous and considerate to others, a scholar and of high culture; with a love for out-door sports, and an expert horseman.

As a lawyer and counsel he was the soul of fairness and of conscientious accuracy, never taking advantage of any slip of his opponents, and in the presentation of evidence concealing nothing, simply seeking to aid the court in arriving at a righteous judgment. In the words of one of our judges, he was "a sound and well-read lawyer, he did not limit himself to the text of the law, but diligently sought the underlying reasons. His eminent fairness was conspicuous and his scorn of petty trickery and undue advantage was in accord with the best traditions of the Bar.

Judicial Appointments.

Edward Lindsey Elwood, of Moosomin, Province of Saskatchewan, Barrister-at-Law: to be a Judge of the Supreme Court of Saskatchewan. (Sept. 20.)

Hon. Albert Edward McPhillips, of the city of Victoria, Province of British Columbia, K.C.: to be a Puisne Justice of the Court of Appeal for British Columbia. (Sept. 20.)

Walter Genge Fisher, of Alliston, Province of Ontario, Barrister-

at-Law: to be Judge of the County Court of the County of Dufferin, in the said Province. (Sept. 20.)

LAW SOCIETY OF ALBERTA.

A meeting of the Bar of Alberta will be held at Calgary on the 18th and 19th inst. to afford further opportunity to the members of the profession throughout the province of coming together and discussing matters of general interest to the profession and of listening to addresses from distinguished members of the Bench and Bar. It is desired that the attendance at this meeting be as large and representative as possible. A special committee has been appointed by the benchers charged to prepare a programme for this occasion and the committee has already given considerable thought to this matter. Further particulars will be given later. Important questions of interest to the profession, such as Legal Education in the province, the creation of a Law School, the admission of practitioners from other countries, the matter of unlicensed conveyancers and other questions of general interest will be discussed. Some distinguished members of the profession from outside the province will be present to deliver addresses. The evenings will be devoted to entertainment at the hands of the Calgary Bar Association, closing with a dinner.

It was incorrectly stated (ante p. 599) that Sir John Simon was of the Hebrew race. Though many of his name belong to that ancient people, the Solicitor-General of England does not.

Flotsam and Jetsam.

"Meester liar, I bote some land of Gunder Larson and I vant a mortgage."

"A mortgage!" asked the lawyer in astonishment.

"Yah, yah."

"No, no," replied the lawyer. "You want a deed."

"No, no," insisted the simple Swede. "I vant no deet. I bote land from Pader Paderson sum yahr ago and got a deet and anoder fellar coom long mit a mortgage and took the lant, so I dink a mortgage bin besser than a deet."

Moral: Have a lawyer examine the title before you buy.

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